Mr Justice Swayne

SUPREME COURT OF THE UNITED STATES.

No. ~~208~~ 206.112.

THE TRUSTEES OF THE WABASH AND ERIE CANAL,
App'ts,

vs.

JOSEPH D. BEERS.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

GIDEON, Printer.

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No. 293.

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App'ts,

vs.

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Pleas of the Circuit Court of the United States for the Seventh Judicial Circuit and District of Indiana, begun, continued, and holden at Indianapolis, in the said district, before the Honorable John McLean, one of the Associate Justices of the Supreme Court of the United States, and Judge of said Circuit, on the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and sixty.

In Chancery.

JOSEPH D. BEERS

vs.

THE TRUSTEES OF THE WABASH AND ERIE CANAL.

Be it remembered, that heretofore, to wit, on the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, the complainant by his solicitor, files his certain bill of complaint, in the words and figures following, to wit:—

United States of America, District of Indiana.

May Term, 1858.

To the Judges of the Circuit Court of the United States for the District of Indiana, Joseph D. Beers, of the city of New York, on behalf of himself and all others competent to sue in this court, who are interested in the same issue of bonds, and who will come in and contribute to the expenses of this suit, and a citizen of the State of New York, brings this his bill against the trustees of the Wabash and Erie Canal, a corporation created by an act of the General Assembly of the State of Indiana, having its residence or organization and place of business in the State of Indiana, and thereupon your orator complains and says that heretofore, to wit, on or about the 16th day of August, 1832, at the district aforesaid, the State of Indiana, by William C. Linton, Nicholas McCarty, and Jeremiah Sullivan, her commissioners thereunto legally appointed and duly constituted, issued and sold for a valuable consideration, two hundred bonds or instruments of writing, commonly called bonds, duly countersigned by Samuel Merrill, Treasurer of State, and bearing an interest of six per centum per annum, payable half yearly, on the first days of January and July, at the Merchants' Bank, in the city of New York, for the purpose of providing means for the construction of the Wabash and Erie Canal, authorized by an act of the General Assembly of the State of Indiana, approved January 9th, 1832, and which said bonds were numbered from one to two hundred, inclusive.

Your orator further states that on the day and year aforesaid, in

the city of New York, to wit, at the district aforesaid, J. D. Beers & Co., citizens of the State of New York, purchased from the State of Indiana, by and through her commissioners above named, and for a valuable consideration then and there paid by them, two of said bonds numbered respectively "69" and "70," each being for the sum of one thousand dollars as aforesaid, with interest as aforesaid, and each having dividend warrants or coupons thereto attached, for the semi-annual instalments of interest money, and when payable, by each of which said bonds there is acknowledged to be due from the State of Indiana to the said J. D. Beers & Co., or bearer, the sum of one thousand dollars, bearing an interest of six per centum per annum from the 15th day of August, 1832, payable semi-annually, on the first days of January and July, at the Merchants' Bank, in the city of New York, on presentation and *and* delivery of the dividend warrants in the margin of said bonds, until payment of the principal sum, which principal sum was stock created in pursuance of the act of the General Assembly aforesaid, and was on a credit of 30 years, but redeemable in whole or in part by the payment of fifty per cent. on each certificate, at the Merchants' Bank aforesaid, after the period of 20 years from the 15th day of August, 1832, at the option of the State; and that for the payment of the interest and the redemption of the principal sum aforesaid, there were irrevocably pledged and appropriated all the moneys to arise from the lands donated by the United States for the construction of the canal, and the canal itself, with the rents and profits thereof, belonging to the State, the sufficiency of which was irrevocably guaranteed by the State of Indiana, all of which will more fully appear by reference to said bonds and dividend warrants, made part thereof as exhibits No. 1 and No. 2.

And your orator says, that he is now and has been ever since the year 1837, in his own right, the bona fide holder of said bonds, and is entitled to demand and receive all the interest money due and unpaid on them and each of them.

He furthermore says, that before said bonds were issued by the State of Indiana as aforesaid, large and valuable tracts of land had been donated by the United States to the State of Indiana for the construction of said Wabash and Erie Canal, and that since the same were issued other large and valuable tracts of land have been also donated to said State by the United States for the same purpose; and further, that since the issuing thereof the said canal has been completed from the Ohio State line to the Tippecanoe River, in the State of Indiana, and from thence to Evansville, in said State, and that large rents and profits have accrued from both of said portions of said canal, and a large amount of tolls have been collected and are now in the possession and under the control of the Board of Trustees of the Wabash and Erie Canal hereinafter named and made defendants hereto; and he further says, that a large and valuable portion of the lands so donated to the State before and

since the issuing of said bonds for the construction of each of said portions of said canal, and a larger amount of money, the proceeds of said lands, which was pledged and appropriated in and by said bonds for the payment of the interest on said bonds, and the redemption of the principal sum are held by and are in the possession and under the control and management of said Board of Trustees.

Your orator states, that heretofore, to wit, on the day of 184 , at the District aforesaid, the Governor of the State of Indiana, in the name and under the seal of said State, by virtue of an act of the General Assembly of the State of Indiana, entitled "An act to provide for the Funded Debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville," approved January 20th, 1846, and an act supplementary thereto, approved January 27th, 1847, did execute and deliver to the Board of Trustees of the Wabash and Erie Canal, a corporation created by said acts, a deed of conveyance for the bed of the Wabash and Erie Canal, and its extension, finished and to be finished, with all its appurtenances and all the lands and lots not theretofore sold or disposed of, that had been donated by the United States to the State of Indiana to aid in the construction of said canal or any part of it, or which might thereafter be acquired under and by reason of any grant then existing, and all moneys due and to grow due and remaining unpaid on account of any sale or sales theretofore made of any canal lands so donated, and all moneys due or to grow due on account of any existing leases of any water-power or other privilege on said canal, its side cuts, feeders, basins, or other appurtenances; said Board of Trustees to have and to hold, possess, and enjoy the same as fully and absolutely as the said State could do, subject, however, to all existing rights and equities against the State on account of the same or any part thereof, or liabilities of the State growing out of, or in relation thereto, all of which will more fully appear by reference to said deed now in the possession of the said Board of Trustees, and which your orator cannot now produce here in court.

Your orator says that the whole of said property, or a great part thereof so conveyed as aforesaid, is still held by said Board of Trustees, subject to the rights and equities aforesaid. And he says that said conveyance was made to said Board of Trustees for the purpose, among other things, of paying to certain bondholders and holders of certificates of stock, created by said act of January 19, 1846, and said supplementary act, the principal sum and interest money, directed by said act to be paid, and in the manner therein prescribed, and he says that such last mentioned bondholders and holders of certificates of stock, and all other holders of any of the bonds of the State for the construction of said canal, are not residents of the State of Indiana, but reside in parts remote and unknown to your orator, and are too numerous if known, to be made

parties here, and, furthermore, he says that his lien on the property so conveyed is prior and paramount to the lien of said bondholder and holders of certificates of stock.

Orator further states, that the State of Indiana has wholly failed to pay the interest or any part of the interest money accruing or becoming due on said bonds numbered "69" and "70," or either of them, since the first day of January, 1841, that is to say, the interest money due July 1, 1841, and the interest money due on the first day of January, 1858, and on each of the first days of January and July intervening between the said first day of July, 1841, and the 1st day of January, 1858, which said interest money amounts to a large sum, to wit, to the sum of two thousand and forty dollars, and he further states that he did on the 16th of March, 1858, duly present said dividend warrants, otherwise called "coupons," at the said Merchants' Bank, in the city of New York, and demanded payment thereof, but payment was refused, whereupon he caused the same to be protested in due form, and he makes said protest a part of this bill, as Exhibit No. 3.

And orator says that he is entitled to, and claims interest on the amount of each of said dividend warrants from the date at which they respectively became payable, and at the rate of seven per cent. per annum, that being the legal rate of interest in the State of New York where, and at the time when said dividend warrants were payable.

Your orator further states, that said Board of Trustees of the Wabash and Erie Canal knew, when they received said conveyance from the Governor of the State of Indiana, that the interest money on said bonds above mentioned, and made Exhibits Nos. 1 and 2, was not paid as aforesaid, and they knew of the rights and equities of the holder of said bonds, and they received said deed for the property therein mentioned, subject to those rights and equities.

Your orator further charges, that a portion of the lands so conveyed by the Governor as aforesaid, the proceeds of which were pledged and appropriated for the payment of the interest on said bonds, and a large amount of money, the proceeds of said lands, are now in the hands, possession, and under the control of said Board of Trustees, and more than sufficient to pay said interest money due to your orator, but what specific lands, or what amount of money is in their lands, your orator is not informed, but he avers that said lands and money are liable for the whole amount due to him as aforesaid.

In tender consideration of the premises, and because your orator is remediless in the premises by the strict rules of the common law, and has no adequate remedy in a court of law, he prays that said Board of Trustees of the Wabash and Erie Canal be made defendant hereto, and that said board be required to answer, according to the rules of this court, the premises specifically, item by item, and to disclose and make exhibit what land, so conveyed as aforesaid,

are still unsold and held by them, lying between the mouth of Tippecanoe River and the Ohio State line, donated by the United States for the construction and completion of said canal; also what amount of money said board has on hand, the proceeds of the sale of any of said lands within the limits aforesaid, and donated and conveyed as aforesaid; also the amount of money in their hands or under their control, being the rents and profits of said section and the net proceeds of tolls collected on said canal or any portion thereof; and that said board make a full disclosure and exhibit of all moneys, securities, leases, or other property held by them, or under their control, being the proceeds of said lands donated and conveyed as aforesaid; also to answer and say whether a deed from the governor of the State of Indiana was not made and delivered to them as aforesaid for the property aforesaid, and that they produce said deed, or a copy thereof, here in court, and that upon the final hearing of this cause the court will order and decree that the whole amount of said semi-annual payments, from the first day of July, 1841, to the 1st day of January, 1858, inclusive, together with interest at the rate of 7 per cent. per annum on each of said semi-annual payments of interest from the time they respectively become due, be declared to be a valid and subsisting lien on the said Wabash & Erie Canal, or so much thereof as is contemplated by said bonds and the act of the General Assembly of the State of Indiana, under and by virtue of which the said bonds were issued; and on the land thereto appertaining, and all privileges thereby created and on the rents and profits of said canal, and the tolls collected and to be collected on said canal, or any portion thereof; and that your honors will decree and adjudge the amount that is due and payable to your orator, and that the same be paid by defendant on a day to be named by your honors; and that in default of such payment the said canal be put into the hands of a receiver until out of the rents and profits or tolls arising or accruing therefrom, the amount justly and equitably due to your orator, and his costs in this behalf, be fully paid; and that your honors will grant to your orator such other and further relief in the premises as to your honors shall seem just and equitable, and your orator will ever pray, &c.

JER. SULLIVAN, for Pl'ff.

And the defendant is required to answer the following interrogatories, Nos. 1, 2, 3, 4, 5, 6:—

1. What amount of money have you on hands, being the proceeds of lands lying east of the Tippecanoe River, donated to the State of Indiana by the United States for the construction of the Wabash and Erie Canal?

2. What amount of money on hands, the proceeds of lands so donated lying west of Tippecanoe River?

3. What amount of money have you on hand or under your control, the proceeds of the rents and profits of said canal, or any

portion thereof, also of tolls collected in said canal or any portion thereof, and distinguish the amount of rents, profits, and tolls arising from that portion of the canal lying east of Tippecanoe River from that lying west of it?

4. What lands (describing them) have you yet unsold that were donated to the State of Indiana by the general government for the construction or completion of said canal?

5. Do you hold a deed from the Governor of the State of Indiana for the lands and other property mentioned in this bill? if yea, produce a copy of said deed; and if not for said property as described in this bill, state property you hold a deed for, and produce a copy of it.

6. Have you made and executed any leases for any portion of said canal or its appurtenances? if yea, what securities of any kind do you hold for said leases, and exhibit them or state the amount and value. JER. SULLIVAN, Solicitor.

May Term, 1860.

And the plaintiff, by leave of the court and with the consent of the defendant's counsel, amends his bill as follows, viz: He alleges that since the filing of the original bill in this behalf the interest moneys on said bonds due July 1, 1858, January 1, 1859, July 1, 1859, and January 1, 1860, have become due and payable, and that the coupons for said semi-annual payment of interest have not been paid, though payment thereof was duly demanded and protest for non-payment made, and the same is now due; and the complainant as to said last mentioned interest money prays as he before prayed, &c. JER. SULLIVAN.

And thereupon on the same day there was issued from the clerk's office of said court a subpœna, in the following words, to wit:—

The President of the United States of America, to the Marshal of the District of Indiana, greeting:—

You are hereby commanded to summon the Board of Trustees of the Wabash and Erie Canal, a corporation created by an act of the General Assembly of the State of Indiana, having its residence, organization, and place of business in the State of Indiana, and a citizen of said State, if they may be found in your District, to appear at the Circuit Court of the United States of America for the District of Indiana, before the judges thereof, at Indianapolis, on the third Monday in May next, then and there to answer the exigency of the bill of complaint of Joseph D. Beers, a citizen and resident of the State of New York, filed in the clerk's office of said court, and have you then and there this writ.

Witness Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of the Circuit Court of the United States for the District of Indiana, hereunto affixed at In-

dianapolis this (14) fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

[SEAL.] HORACE BASSETT, Clerk.

The defendants will enter their appearance to the complainant's bill of complaint on or before the third Monday in May next, or in default thereof the same will be taken pro confesso.

HORACE BASSETT, Clerk.

Which subpœna was then and there delivered to the marshal of said District, and afterwards by him duly returned to the office from whence it issued with the return endorsed thereon as follows, to wit:—

As commanded served this process upon the within named Trustees of the Wabash and Erie Canal by delivering a copy in person to Jacob Hager, Clerk for said Board of Trustees, at the office of said Board in the city of Terre Haute, on the 15th day of April, 1858, the President of said Board being temporarily absent from home.

JOHN L. ROBINSON, Marshal.
By JNO. H. REA, Deputy.

And afterwards, to wit, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and fifty-eight, at a Circuit Court of the United States for the District of Indiana, begun and holden before the Honorable Elisha M. Huntington, District Judge of the United States for the District of Indiana.

Comes now the complainant, by his solicitor, and on his motion this defendant is ruled to answer on the 22d day of June next; and day thereof is given the parties.

And afterwards, to wit, on the twenty-fourth day of June, in the year last aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the Honorable Judge aforesaid.

Comes now the defendant and files his demurrer in these words and figures, to wit:—

The defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth that the said bill is defective for the want of parties defendant. That the said bill is defective and bad for want of equity therein. And that the complainant by his said bill shows, that he has no cause of complaint against the defendant, and does not show but that the State of Indiana has redeemed and paid off moneys borrowed by her, a sum of money equal to that for which the lands in the complaint mentioned granted for building the canal east of Tippecanoe River was pledged.

Whereupon, and for divers other causes of demurrer appearing in the said bill, these defendants demand the judgment of this hon. court, whether they shall be compelled to make any further

or other answer to the said bill; and prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

In witness that the foregoing is the demurrer of the defendants, the resident trustee and clerk of the corporation defendant have hereto set their hands and affixed the seal of the said corporation.

[SEAL.] THOS. DOWLING,
Res. Trustee.
J. H. HAGER, Clerk.

I hereby certify that in my opinion there is good cause for the filing of the foregoing demurrer, and that the same is well founded in point of law.

J. P. USHER,
Of Counsel for Defendants.

And after argument heard the court do overrule the same, and the defendants are ruled to answer herein.

And afterwards, to wit, on the twenty-ninth day of June, in the year aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the honorable judge aforesaid.

Come now the parties by their attorneys, and this cause is continued.

And afterwards, to wit, on the eighth day of July, in the year aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the honorable judge aforesaid.

Come now the defendants and file their answer in the words and figures, to wit:—

THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL
ads.
JOSEPH D. BEERS.

The said defendants by their solicitor, now and at all times hereafter saving and reserving for themselves all, and all manner of benefit and advantage of exception which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as these defendants are advised is in anywise material or necessary for them to make answer unto, they answer and say: That they admit that the said Linton, McCarty, and Sullivan, as commissioners, did execute the bonds or certificates in the bill mentioned, and that the said complainant is the holder of the bonds in said bill mentioned, and set forth; but defendants have no knowledge, and are not informed whether said commissioners were duly appointed, or whether they had authority under the said act of 9th January, 1832, to issue said bonds; and as these defendants are acting in a fiduciary capacity only, they cannot admit that the said bonds are legally issued, but leave the complainant to establish that matter by proof, as he shall be advised, and these defendants answer and say that as to the paying of

interest by the State, and the interest yet due upon said bonds, these defendants have no knowledge other than is contained in the bill, and common rumor; but they believe that said interest is unpaid, as in the bill is alleged.

Respondents say, that as trustees of the Wabash and Erie Canal they hold the deed or patent of the governor of the State of Indiana, made in pursuance of and in accordance with the eighth section of the act entitled "An act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville," approved January 29th, 1846, and the act supplemental and amendatory thereto, approved January 27th, 1847, and that under said deed and patent, they, as such trustees, do have, hold, and control all the canal and property mentioned in said act, and intended to be conveyed in and by said deed, except such portion thereof as has been converted into stock, the due execution of said trust, as in said deed specified and directed.

These respondents do not admit, but deny, that they hold said property in trust for the payment of the said alleged bonds of the plaintiff, or that said complainant has, or now can have, any equity therein, but they say they hold said property for the benefit of the persons or holders of stock surrendering their bonds and subscribing their fund for the completion of said canal, and to holders of stock for bonds of the State surrendered without subscription, and but for which surrender said acts would not and could not have taken effect. That no provision whatever was made by the State in said acts, for the payment of the interest on complainant's said bonds by these defendants, unless the complainant complied with said acts; nor had the complainant any means of realizing said interest or any part thereof, except by the surrender of said bonds, in accordance with the terms of said acts.

That a large majority of the holders of the stock to be redeemed in principal and interest out of said property transferred to defendants, and held by them in trust, are residents of the city and State of New York, and all of the *cestui que* trusts under said acts, with the exception of one James Cook, are non residents of the State of Indiana, and have not at any time resided in said State.

These defendants state that the said *cestui que* trusts are directly interested in the fund sought to be reached by the complainant, and, if the complainant is successful in this his suit, will be injured to the extent of the complainant's success. The names of the persons thus interested will be found at the office of the non-resident trustee in the city of New York, where said stocks are transferable; a list of the names of said persons thus interested are hereto appended and made a part hereof; and these defendants further say, that they are advised that the said *cestui que* trusts are necessary parties to this suit, defendants, and pray that the plaintiffs be required to make them such defendants.

These defendants further say, that the complainant among other

bondholders of the State of Indiana, with the purpose and intent of having the aforesaid acts of the legislature of Indiana, providing for the funded debt of the State and the completion of the canal to Evansville, take effect, surrendered thirteen bonds of the said State of the like tenor and effect of those made exhibits in the complainant's bill, and at the same time the complainant subscribed ten per cent. thereon, being his *aliquot* part of the $800,000 required to be subscribed and advanced by said bondholders in order to the taking effect of said act.

The complainant and other bondholders of the said State have, under said acts, surrendered to the State eight millions one hundred and fifty-nine thousand dollars of the bonds of the State, independent of the interest due upon the same, all of which principal and interest have been funded under said acts.

The said bondholders, or a portion of them, subscribed as aforesaid at the time of said surrender to the fund to be expended in the completion of the canal, the sum of $815,900, all of which has been paid by the subscribers and expended by defendants in and about said trust; that said subscribers for the most part, had the same equitable rights and interests in the said canal lands and property, that the complainant now pretends to have, and it was then expected and believed by the parties to said trust that all the creditors of the State would avail themselves of the provisions of those acts; and respondents set up by way of defence, and allege that the complainant is by his own conduct estopped from endeavoring in any manner to divert the said canal property from being converted and used in accordance with the provisions of said trust, which he aided as aforesaid in putting in force, more especially when the facts hereafter next stated are considered.

Of the aforesaid advance of $815,900, there has been paid to the subscribers $244,770, leaving $571,130, and accruing interest yet to be paid them. A construction has been put upon said acts by the Supreme Court of the State, binding upon defendants, by which they are required to pay the interests on the stocks issued in lieu of original Wabash and Erie Canal Bonds (to which class the complainants' bonds belong); from and after the 1st January, 1853, out of the net revenue of the canal from Lafayette inclusive to the State line, east, at the rate of 5 per cent. per annum; and said defendants have, according to said decision, paid the interest for the years 1853 and 1854 in full, amounting to $111,455 85, and out of the revenue of the canal east, accrued since the year 1854, the sum has been in part expended in keeping said canal in repair, and all since the recent heavy floods will be required to put and keep said canal in repair. The diminished revenue of the canal is to be attributed to the great competition that the canal has encountered from adjacent railroads, successfully competing for the business of the canal, and respondents withheld said revenue from the payment

4 Ind. Rep. 495.

of the interest to keep the canal in repair; and judging from the past, it is not probable that the sum on hand at this time, and accumulating income of said canal will more than keep the same in repair. The expense of repairs and superintendence of the canal last year, exceeded the revenue by about $55,000, and the prospect is that an increased deficit will be shown this current year.

The total valuation of the unsold lands, and the amount due and to become due and payable on the lands sold, was on the 1st Dec., 1857, $394,707^{16}, the balance of cash on hand at that date was $84,347 02; the suspended debt due to the trust was $66,736^{40}, making a total of $545,789^{58}, which last sum was and is the entire assets of the trust (except the canal), and the only means of paying the balance of interest on the bonds aforesaid, and the balance of the advance of $815,900, being $571,130, the deficit must at least be $75,000, out of the funds on hand, the injuries to the canal by the late floods are to be repaired, estimated at more than $40,000, and further diminishing the fund of the subscribing bondholders.

Thus it will be seen that the subscribers to said fund for completing said canal to Evansville had equal equities with the complainant before subscribing and paying their money; and now having in good faith subscribed and paid they have the superior and better equity and right to said funds, their loss being more than a $115,000 as aforesaid, unless they can make themselves whole out of the revenues of the canal, of which there is but little probability.

Further answering these defendants says, that at the time the trust took effect the whole available means and assets of the canal lands and proceeds of lands east of Tippecanoe River was $318,097$^{89}_{00}$, upon and against which there were near two millions of outstanding bonds of the State, the holders of which had the same equities upon said lands and proceeds of lands that the complainant may or can have; and which bond-holders, with the exception of about two hundred thousand dollars thereof, have surrendered their bonds and become parties to said trust, and they, together with the holders of the outstanding two hundred thousand dollars in bonds, ought to be made parties to this suit, they having an equal right (if your honors entertain this bill) to participate in said fund claimed by complainant, and which remains yet to be converted under said trust, now amounting to about $30,000 only, being the aggregate value of lands unsold and the amount due for principal and interest of land sold east of Tippecanoe River.

And these defendants further answering say, that by the act of the General Assembly of the State of Indiana, referred to in complainant's bill, approved January 9th, 1832, the land donated to the State by the United States, and the canal, &c., were pledged by the said State for the redemption of $1,081,970 only, to be borrowed for the construction of said canal, and which sum and much more

was by said State borrowed for the construction of said canal, and bonds given therefor; and which bonds to the amount of more than $1,500,000, were taken up and cancelled by said State before the execution of said deed by the Governor, and the holders of said bonds have become parties to said trust. Wherefore said defendants say that the said pledge by the State has been by the State redeemed, and the said lands and property was by the deed aforesaid conveyed to the defendants exempt and discharged of said trust claimed and alleged by the complainant.

Respondents say, that a list and description of the lands held by them under the said deed of the Governor, which were donated to the State by the United States for the construction of the Wabash and Erie Canal, east of Tippecanoe River, is contained in the amended exhibit marked "B," to which the complainant is referred.

That the said deed is of record in the office of the Secretary of State at Indianapolis, and defendants will produce the original if required and desired by the complainant.

That there are various leases of water-power existing, which were in part made by defendants and in part by the State before the taking effect of said act organizing the trust; all which leases are in possession of defendants, and are ready to be produced if directed by the court or desired by the complainant, but as the tolls and water rents will not keep said canal in repair, respondents suppose that copies of said leases or the production of them will be useless.

Respondents further say that they have no funds or property of any kind under their control, or in their possession, out of which they may or can pay the complainant the interest upon his said supposed bonds, nor have they any funds or property in their possession or under their control, by or out of which the complainant can have his said alleged interest, or any part of it.

And now, whatever in said bill is not herein admitted, traversed or denied, the defendants say that the same is not true, and having fully answered, prays to be herein dismissed with their costs and charges by them in this behalf most unreasonably sustained.

The defendants attest this their answer by the corporate seal of the defendants, and the signature of the President and principal Clerk of the corporation.

[SEAL.]

THOS. DOWLING,
President Trustee.

J. H. HAGER, Prin. Clerk.

J. P. USHER, Sol. for defendants.

Statement showing the subscriptions to the advance of $800,000 for the completion of the Wabash and Erie Canal, agreeably to the act of the General Assembly of the State of Indiana, entitled "An act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville," passed 19th January, 1846, and "An act supplementary thereto," passed

January 27th, 1847, showing the date of subscription, the names of subscribers, their residence, and the number and amount of bonds subscribed by each.

Date 1847.	Names of Subscribers.	Residence.	Number of Bonds.	Amount of Bonds.
June 1.	James Aitkin,	Europe.	31	31,000 00
" "	Thos. Rose Auldrige,	do	18	18,000 00
" "	John Auldge,	do	16	16,000 00
" "	John Agate,	United States.	3	3,000 00
" "	H. D. Auldrich,	do	30	30,000 00
" "	D. J. Anderson,	do	10	10,000 00
" "	Albert G. Allen,	do	5	5,000 00
" "	John Jacob Astor,	do	53	53,000 00
" "	Albion, Bank of	do	5	5,000 00
Sep. 29.	John W. Anderson,	Europe.	2	2,000 00
Oct. 1.	Wm. H. Aspinwall,	United States.	24	24,000 00
June 1.	Thos. Bro's,	Europe.	10	10,000 00
" "	Baring Bros. & Co.,	do	17	17,000 00
" "	Same,	do	83	83,000 00
" "	Same,	do	7	7,000 00
" "	Same,	do	89	89,000 00
" "	Margaretta Betts,	do	3	3,000 00
" "	Mrs. Bliss,	do	3	3,000 00
" "	G. & J. Bagnall, Ex'rs,	do	11	11,000 00
" "	George Bagnall,	do	1	1,000 00
" "	James Bagnall,	do	1	1,000 00
" "	Bouvirie & Co.,	do	9	9,000 00
" "	Alexander Baillie,	do	5	5,000 00
" "	Constance Lydia Buryon,	do	10	10,000 00
" "	John Law Baker,	do	7	7,000 00
" "	G. Beadnell,	do	1	1,000 00
" "	Joseph D. Beers,	United States.	13	13,000 00
" "	A. Buckingham,	do	30	30,000 00
" "	B. H. Buckingham,	do	5	5,000 00
" "	Buckingham & Sturgies,	do	2	2,000 00
" "	Thos. Black & Co.,	do	5	5,000 00
" "	Robert Bayard, Trustee,	do	20	20,000 00
" "	E. B. Barton,	do	10	10,000 00
" "	Philo Buckingham,	do	5	5,000 00
" "	John Buckingham,	do	5	5,000 00
" "	Ebenezer Buckingham,	do	5	5,000 00
" "	William Buckingham,	do	5	5,000 00
" "	Briggs & Grun,	do	2	2,000 00
" "	John A. Bradley,	do	3	3,000 00
" "	Thos. Biddle & Co.,	do	13	13,000 00
" "	August Belmot,	do	3	3,000 00
" "	John C. Baldwin,	do	6	6,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bonds.	Amount of Bonds.
June 1.	Daniel Beckle,	United States.	16	16,000 00
" "	James Brown,	do	1	1,000 00
" "	Alvah Buckingham,	do	10	10,000 00
" "	David Banks,	do	1	1,000 00
" "	Sebury Brewster,	do	5	5,000 00
" "	Bugs de Bordes & Jordan,	Europe.	4	4,000 00
Oct'r. 1.	Alvah Buckingham,	United States.	10	10,000 00
" "	Same,	do	10	10,000 00
" "	Same,	do	25	25,000 00
" "	August Belmont,	do	156	156,000 00
" "	John R. Brodhead,	Europe.	1	1,000 00
Sep. 29.	James Cook,	do	25	25,000 00
June 1.	Capel Cure,	do	20	20,000 00
" "	Gen. Geo. Carpenter,	do	10	10,000 00
" "	Morgan Charles Case,	do	5	5,000 00
" "	Sir William Collings,	do	5	5,000 00
" "	William E. Culver,	United States.	1	1,000 00
" "	Geo. R. Chetwood,	do	3	3,000 00
" "	Margaret H. Clark,	do	24	24,000 00
" "	John E. Cowles,	do	1	1,000 00
" "	C. D. Coffin & L. Miner,	do	21	21,000 00
" "	Charles C. Converse,	do	10	10,000 00
" "	Thos. Cotbrell,	Europe.	26	26,000 00
" "	Wm. M. Converse,	U. States.	2	2,000 00
" 21.	Chapman & Co.,	do	1	1,000 00
" 1.	Chas. Christmas,	do	11	11,000 00
" "	Sandford Colly,	do	10	10,000 00
" "	Caning & Co.,	do	5	5,000 00
" "	D. Clarkson,	do	8	8,000 00
Oct. 1.	Carpenter & Vermylia,	do	2	2,000 00
" "	Corning & Co.,	do	4	4,000 00
" "	F. L. B. Dykes, J. G. Marshall, & Henry C. Marshall,	Europe.	90	90,000 00
June 1.	Charles Dixon,	do	200	200,000 00
" "	Wm. Docar,	do	4	4,000 00
" "	Maria Denman,	do	4	4,000 00
" "	Thomas Dixon,	do	10	10,000 00
" "	Saml. Dobree,	do	7	7,900 00
" "	John Dillon,	do	13	13,000 00
" "	Miss G. Dent,	do	27	27,000 00
" "	Thomas Dent,	do	284	284,000 00
" "	Col. Francis Daniel,	do	18	18,000 00
" "	J. T. Darthey, Jr.,	do	15	15,000 00
" "	Sarah Dilhoyn,	do	5	5,000 00
" "	Harrison Ducker,	United States	8	8,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bonds.	Amount of Bonds.
June 1.	Jno. De Graaff,	United States.	3	3,000 00
" "	Francis J. Dallam,	do	2	2,000 00
" "	John Derr,	do	1	1,000 00
" "	Martha E. Dernham,	do	1	1,000 00
" "	P. P. F. De Grand,	do	2	2,000 00
" "	Jos. Drake,	do	4	4,000 00
" "	Geo. H. Dunn,	do	4	4,000 00
" "	O. S. Dinsbury,	do	2	2,000 00
" "	S. G. Darris,	do	5	5,000 00
" "	Isaac Darris,	do	5	5,000 00
" "	James M. Drake,	do	2	2,000 00
" "	Thomas E. Darris,	do	1	1,000 00
Oct. 1.	Augustie Dassier,	Europe.	6	6,000 00
" "	Joseph Drake	U. States.	4	4,000 00
Sep. 29.	Capt. Thos. Eyre,	Europe.	22	22,000 00
June 1.	John Evans,	do	12	12,000 00
" "	Capt. Thos. Evans,	do	4	4,000 00
" "	R. Eykin,	do	2	2,000 00
" "	Thos. & Wm. Earle & Co.,	do	15	15,000 00
" "	John Ellis,	United States.	10	10,000 00
" "	Richard Fall,	Europe.	9	9,000 09
" "	Robt. J. Fitzpatrick,	do	11	11,000 00
" "	John H. Ferguson and others, trustees of Capt. and Mrs. Jas. Abbott,	do	13	13,000 00
" "	Miss A. P. Ferguson,	do	4	4,000 00
" "	John Ferguson,	do	20	20,000 00
" "	Floyd T. Fennis,	United States	11	11,000 00
" "	John Ferguson,	do	99	99,000 00
" "	Patrick Fanning,	do	8	8,000 00
" "	Wm. J. Furman,	do	5	5,000 00
" "	Samuel Fosdick,	do	34	34,000 00
" "	John Ferguson,	Europe.	27	27,000 00
" "	Samuel Fosdick,	United States.	9	9,000 00
" "	Elizabeth Fish,	do	1	1,000 00
" "	Murray Forbes,	do	5	5,000 00
" 7.	Joseph L. Fry,	do	2	2,000 00
" 1.	Joseph Godman,	Europe	10	10,000 00
" "	John Greenwood,	do	2	2,000 00
" "	Edward Grubb,	do	8	8,000 00
" "	John Gilliatt & Co.,	do	5	5,000 00
" "	J. Gilliatt & Co., & Alex. Hatfield,	do	7	7,000 00
" "	John Gilliatt & Co.,	do	5	5,000 00
" "	Same,	do	5	5,000 00
" "	Thos. W. Gall,	United States.	5	5,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bonds.	Amount of Bonds.
June 1.	A. Groesback,	United States.	1	1,000 00
" "	Wm. Greaves,	do	2	2,000 00
" "	Solomon Griffin,	do	3	3,000 00
" "	S. S. Goodman & Co.,	do	12	12,000 00
" "	D. S. Gregory,	do	8	8,000 00
" "	Henry Gardner, Trustee,	do	6	6,000 00
" "	Lockwood Grummon,	do	3	3,000 00
" "	Sam'l J. Gardner, Trustee,	do	20	20,000 00
" 7.	Gowan & Mare,	do	3	3,000 00
" 1.	Gilbert, Cobb & Johnson,	do	30	30,000 00
" "	W. W. Gilbert,	do	10	10,000 00
" 10.	R. Ogden Gliven,	do	2	2,000 00
" 22.	George Griswold,	do	100	100,000 00
Oct. 1.	Frederick A. Gudewill,	Europe.	8	8,000 00
" "	Wm. Goodman,	United States.	7	7,000 00
June 1.	Henry Hebbort,	Europe.	9	9,000 00
" "	Matthew Harrison,	do	2	2,000 00
" "	Edward Harrison,	do	2	2,000 00
" "	Geo. Harrison,	do	5	5,000 00
" "	Thomas G. Headlam,	do	10	10,000 00
" "	Sir Fred'k W. Heygate,	do	20	20,000 00
" "	Isaac Hodgson,	do	20	20,000 00
" "	James Hutchinson,	do	5	5,000 00
" "	Lewis H. Hazlewood,	do	3	3,000 00
" "	John Hackblock,	do	12	12,000 00
" "	Hugh Hartshan,	United States.	1	1,000 00
" "	John D. Hagar,	do	8	8,000 00
" "	H. H. Hannewell,	do	22	22,000 00
" "	R. S. Haines,	do	10	10,000 00
" 16.	Geo. Hull,	do	5	5,000 00
" 1.	Peter Harmony,	do	25	25,000 00
" "	Daniel Hall,	do	3	3,000 00
" "	S. P. Hildreth,	do	1	1,000 00
" "	Wm. H. Hart,	do	1	1,000 00
" "	Betsy Amelia Hart,	do	6	6,000 00
" "	Ann E. Henderson,	do	8	8,000 00
" "	Reuben Hope,	do	2	2,000 00
" "	F. Huth & Co.,	Europe.	127	127,000 00
" "	Robert Hyslop,	United States.	8	8,000 00
" 21.	F. Huth & Co.,	Europe.	5	5,000 00
" 1.	Alfred Hoyt,	United States.	4	4,000 00
" "	Jas. Halford,	Europe.	200	200,000 00
" "	W. H. Hays & Co.,	United States.	10	10,000 00
" "	Hicks & Co.,	do	20	20,000 00
" "	J. S. Hastings,	do	5	5,000 00
" "	Hoyt & Hunt,	do	10	10,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of bonds.	Amount of bonds.
Oct. 1.	Joseph Thorne,	Europe.	7	7,000 00
Sep. 29.	Rich. L. Jones,	do	5	5,000 00
June 1.	Jno. B. Inglis, Trustee,	do	27	27,000 00
" "	George Jenkins,	do	4	4,000 00
" "	Miss M. Jones,	do	8	8,000 00
" "	Chas. Inman,	do	15	15,000 00
" "	Alfred Janson,	do	5	5,000 00
" "	Wm. Janson,	do	5	5,000 00
" 17.	John A. Iselin,	United States.	12	12,000 00
" 1.	Charles Jones,	do	2	2,000 00
" "	Charles Judson,	do	2	2,000 00
" "	Walter R. Jones,	do	2	2,000 00
" "	Jones, Woodward & Co.,	do	1	1,000 00
Oct. 1.	Robert Kelly,	do	1	1,000 00
" "	Robert Kemp,	Europe.	5	5,000 00
" "	D. & A. Kingsland,	United States.	2	2,000 00
June 1.	John Kingham,	Europe.	22	22,000 00
" "	Langford Kennedy,	do	11	11,000 00
" "	William Krawlter,	do	1	1,000 00
" "	W. Krawlter & J. S. Melville,	do	22	22,000 00
" "	H. W. Koll,	do	7	7,000 00
" "	Jas. G. King & Sons,	United States.	7	7,000 00
" "	Nauman S. Kenyon,	do	1	1,000 00
" "	Dr. Wm. Keith,	do	8	8,000 00
" "	Edward King,	do	45	45,000 00
" "	Rufus H. King,	do	10	10,000 00
" "	Robert Kelly	do	9	9,000 00
" "	George Kinny,	do	3	3,000 00
" "	John Kean,	do	1	1,000 00
" "	Daniel Kissain, jr.,	do	4	4,000 00
" "	Wm. J. King,	do	2	2,000 00
" "	Haynes Lord, Trustee,	do	1	1,000 00
" "	Dr. Levi Wolfe,	do	10	10,000 00
" "	Le Grand Lockwood,	do	1	1,000 00
" "	Francis Siebo,	do	1	1,000 00
" "	William Lawrence,	do	1	1,000 00
" 2.	John W. Leeds,	do	1	1,000 00
" 1.	Emery Low,	do	3	3,000 00
" "	Joseph Lake & Co.,	do	24	24,000 00
" "	Jean Chas. Labouchere,	Europe.	1	1,000 00
" "	Solomon Luxmore,	do	17	17,000 00
" "	Thomas Likon,	do	6	6,000 00
" "	Henry Laver,	do	6	6,000 00
" "	Israel H. Lewis,	do	9	9,000 00
" "	John Padscal Larkins and other Trustees,	do	3	3,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of bonds.	Amount of bonds.
June 1.	Fred'k Cubin Lukes,	Europe.	9	9,000 00
" "	Joseph Langton,	do	135	135,000 00
" "	Skinner T. Langton,	do	20	20,000 00
Oct. 1.	Matthew Marshall,	do	2	2,000 00
" "	Wm. Moore,	United States.	1	1,000 00
" "	A. Marcuard & Co.,	Europe.	25	25,000 00
June 1.	Jas. Morrison,	do	40	40,000 00
" "	Morris Provost & Co.,	do	23	23,000 00
" "	Thos. & Jno. R. Mills, Ex'rs of Samuel Mills,	do	135	135,000 00
" "	Godfrey Malling,	do	21	21,000 00
" "	Francis Morton,	do	14	14,000 00
" "	Capt. H. Meynell,	do	5	5,000 00
" "	Richard Moore,	do	5	5,000 00
" "	Robert Moore,	do	5	5,000 00
" "	Edward Moore,	do	9	9,000 00
" "	James Moore,	do	9	9,000 00
" "	Thos. A. S. Melville,	do	13	13,000 00
" "	Wm. L. Maberly,	do	3	3,000 00
" "	Wm. H. Mullin & D'd Lloyd,	do	1	1,000 00
" "	Cath. Ellen Morton,	do	2	2,000 00
" "	Henrietta Moulford,	do	49	49,000 00
" "	Francis Mills,	do	89	89,000 00
" "	John Miller,	do	5	5,000 00
" "	Henry Handivill,	United States.	3	3,000 00
" "	Jas. W. Miller,	do	3	3,000 00
" 22.	John Mills,	do	2	2,000 00
" 1.	John Mills, Trustee,	do	3	3,000 00
" "	Isaac Morrill, Trustee,	do	10	10,000 00
" "	R. H. McCurdy,	do	2	2,000 00
" "	Samuel Miller,	do	24	24,000 00
" "	McCurdy Aldrich,	do	7	7,000 00
" "	E. S. McIntosh,	do	4	4,000 00
" "	Moran & Iselin,	do	33	33,000 00
" 3.	Meyer & Stockton,	do	6	6,000 00
" 1.	Chas. Mixter,	do	14	14,000 00
" "	Gregorio Martius Del. Rio,	Europe.	28	28,000 00
" "	William Maxwell,	United States.	4	4,000 00
" "	John Maxwell,	do	5	5,000 00
" "	Lascellus E. Maxwell,	do	10	10,000 00
" "	Chas. Morrison,	Europe.	9	9,000 00
" "	John Mills, Trustee,	United States.	2	2,000 00
" "	Lascellus E. Maxwell,	do	3	3,000 00
" "	Robert Marshall,	do	1	1,000 00
" "	Merchants' Bank, Boston,	do	30	30,000 00
" "	Samuel Miller,	do	10	10,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bonds.	Amount of Bonds.
June 1.	R. Mott, Jr. & Bownie Ex'r,	U. S.	5	5,000 00
" "	George Ward Norman,	Europe.	8	8,000 00
" "	Aurius Nye,	United States.	2	2,000 00
" "	Anslim S. Nye,	do	3	3,000 00
" 22.	A. S. Nye, Trustee,	do	1	1,000 00
" 1.	Henry Nichie,	do	2	2,000 00
" "	Nevius Townsend & Co.,	do	48	48,000 00
Oct. 1.	Walter Nugent,	Europe.	2	2,000 00
June 1.	Ovound, Gurney & Co.,	do	82	82,000 00
" "	Richard Oliverson,	do	33	33,000 00
Oct. 1.	William St. Ogden,	do	6	6,000 00
June 1.	John Piggott,	do	5	5,000 00
" "	Robert Pulsford,	do	25	25,000 00
" "	Sir Jeffrey Pendegrest,	do	10	10,000 00
" "	David Pugh,	do	5	5,000 00
" "	Mrs. M. Palmer,	do	2	2,000 00
" "	Palmer, Maciloft, Dent & Co.,	do	180	180,000 00
" "	Ge. Peabody,	do	40	40,000 00
" "	Thos. Potts,	do	7	7,000 00
" "	Wm. B. Pellott,	United States.	2	2,000 00
" 5.	Phelps, Dodge & Co.,	do	7	7,000 00
" 22.	Prince, Ward & Co.,	do	1	1,000 00
" 3.	David M. Prall,	do	15	15,000 00
" 1.	Col. Joseph Patterson,	do	1	1,000 00
" "	Parenstedt & Schumacher,	do	5	5,000 00
Oct. 1.	Edward Prossor,	Europe.	10	10,000 00
" "	J. N. Perkins,	United States.	20	20,000 00
June 1.	Thos. Robinson,	Europe.	10	10,000 00
" "	Sir W. H. Richardson,	do	17	17,000 00
" "	George Robinson,	do	3	3,000 00
" "	John H. Ravenshale,	do	23	23,000 00
" "	N. M. Rothschild & Sons,	do	880	880,000 00
" "	Raividson, Groesbeck and Bridgman,	United States.	52	52,000 00
" "	Robert & Williams,	do	4	4,000 00
" "	Wm. S. Robert,	do	2	2,000 00
" "	Wm. Reynolds,	do	5	5,000 00
" "	D. B. Ryall,	do	22	22,000 00
" "	Archibald Robertson,	do	8	8,000 00
" "	David Robert & Wife,	do	2	2,000 00
" 21.	Wm. Redmond, Trustee,	do	11	11,000 00
" "	A. B. Rirby,	do	1	1,000 00
" "	Elisha Riggs,	do	22	22,000 00
Oct. 1.	Clement Remington,	do	5	5,000 00
June 1.	Lady K. C. Sherbrooke,	Europe.	3	3,000 00
" "	S. G. Smith,	do	37	37,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bonds.	Amount of Bonds.
June 1.	Same,	Europe.	252	252,000 00
" "	Isabella K. Smith,	United States.	8	8,000 00
" "	William Sturges,	do	1	1,000 00
" "	Solomon Sturges,	do	10	10,000 00
" "	Joshua Summons,	do	4	4,000 00
" "	Hezekiah Sturges,	do	5	5,000 00
" "	Samuel Starkweather,	do	6	6,000 00
" "	J. S. Spencer,	do	5	5,000 00
" "	Wm. Sturges,	do	8	8,000 00
" "	Solomon Sturges,	do	45	45,000 00
" "	Hezekiah Sturges,	do	5	5,000 00
" "	Edward Sturges,	do	5	5,000 00
" "	Eben P. Sturges,	do	5	5,000 00
" "	Jonathan Sturges,	do	24	24,000 00
" "	James Stephenson,	do	1	1,000 00
" "	Sophia & H. Smith,	do	3	3,000 00
" "	Austin Smith,	do	12	12,000 00
" "	Peter Schumerhorn,	do	6	6,000 00
" "	Hugh C. Smith,	do	9	9,000 00
" "	Isabella K. Smith,	do	1	1,000 00
" "	Charles Stetson,	do	5	5,000 00
" "	John Shilleto,	do	13	13,000 00
" "	David Smith,	do	19	19,000 00
" "	Edwin Sherwood,	do	3	3,000 00
" "	Nancy Sistare,	do	1	1,000 00
" "	Daniel H. Safe,	Europe.	5	5,000 00
" "	Charlotte Stock,	do	6	6,000 00
" "	Henry Shank,	do	5	5,000 00
" "	Thomas Temple Silver,	do	11	11,000 00
" "	Dr. Wm. Silver,	do	8	8,000 00
" "	Richard Sanderson,	do	20	20,000 00
Oct. 1.	W. Stancombe,	do	24	24,000 00
" "	G. R. Shore,	do	24	24,000 00
" "	Chas. Stetson,	United States.	10	10,000 00
June 1.	Sanderson & Co.,	do	96	96,000 00
" "	Wm. Sheffield,	do	9	9,000 00
" "	Abel Smith,	Europe.	50	50,000 00
" "	Aug. Baron de Stinburg,	do	15	15,000 00
" "	Capt. Honoratus L. Thomas,	do	9	9,000 00
" "	W. Thompson,	do	1	1,000 00
" "	Thomas Livney,	do	61	61,000 00
" "	Miss Mary Traddle,	do	3	3,000 00
" "	Thos. Stokes,	do	20	20,000 00
" "	Henry M. Smith,	United States.	1	1,000 00
" "	Charles Smith,	do	2	2,000 00
" "	Caleb Swann,	do	2	2,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bond.	Amount of Bonds.
June 1.	Isaac Sigmon, Cashier,	United States.	8	8,000 00
" "	Horace Stocking,	do	20	20,000 00
" "	Same,	do	20	20,000 00
" "	Charles Stetson,	do	9	9,000 00
" "	Geo. K. Sistine, trustee,	do	4	4,000 00
" "	Same,	do	10	10,000 00
" 2.	Standford Bank,	do	5	5,000 00
" 1.	St. John Smith,	do	6	6,000 00
" "	Stadtmuki & Van Hucklin,	Europe.	2	2,000 00
" "	Strachan & Scott,	United States.	23	23,000 00
Oct. "	Solomon Sturgin,	do	20	20,000 00
" "	Wm. Sturges,	do	1	1,000 00
" "	Ebenezer P. Sturges,	do	5	5,000 00
" "	Edward Sturges,	do	5	5,000 00
" "	Solomon Sturges,	do	20	20,000 00
" "	Samuel Salter,	Europe.	20	20,000 00
" "	Robert Shewell,	U. States.	2	2,000 00
June 1.	J. Taylor, Cashier,	do	52	52,000 00
" "	J. Taylor, Treas.,	do	7	7,000 00
" "	A. M. Taylor	do	40	40,000 00
" "	A. M. Taylor & Co.,	do	31	31,000 00
" "	C. C. Tunis,	do	5	5,000 00
" "	Catharine A. Line,	do	1	1,000 00
" 23.	G. & C. B. Theding,	do	1	1,000 00
" 1.	Frank Taylor,	do	3	3,000 00
Oct. 1.	John E. Thayer & Brother,	do	12	12,000 00
" "	Ovid Vivarh,	Europe.	7	7,000 00
June 1.	Ira C. Voorhus,	U. States.	1	1,000 00
" "	D. J. Vail,	do	2	2,000 00
" 9.	J. G. Vassar,	do	2	2,000 00
" 1.	Jas. J. Van Allen,	do	38	38,000 00
" "	Same,	do	5	5,000 00
" "	Same,	do	2	2,000 00
" 23.	W. M. Vomylia, Trustee,	do	2	2,000 00
" 1.	Jno. C. Whiteman,	Europe.	110	110,000 00
" "	Wilkins & Co.,	do	18	18,000 00
" "	Wm. Williams,	do	20	20,000 00
" "	Wm. Wilkinson,	do	27	27,000 00
" "	Rich'd Waine Wood,	do	10	10,000 00
" "	Thos. Wilson & Co.,	do	30	30,000 00
" "	Sir J. Monllyon Wilson,	do	13	13,000 00
" "	G. Wallis,	do	2	2,000 00
" "	Ben. Bacon Williams,	do	8	8,000 00
" "	Henry Waterman,	United States.	1	1,000 00
June 1.	Israel Williams,	do	2	2,000 00
" "	Gabriel Wisner,	do	4	4,000 00

Date 1847.	Names of Subscribers.	Residence.	Number of Bond.	Amount of Bonds.
June 1.	Edward Wells,	United States.	10	10,000 00
" "	John Wells,	do	5	5,000 00
" "	James Wells,	do	5	5,000 00
" "	N. P. Wells,	do	5	5,000 00
" 3.	W. S. Wetmore,	do	46	46,000 00
" 1.	Robt. Watkinson,	do	6	6,000 00
" "	Miles White,	do	5	5,000 00
" "	David Watkinson,	do	21	21,000 00
" "	Samuel G. Wyman,	do	10	10,000 00
" 5.	N. Wathington,	do	292	292,000 00
" 1.	Washington Insurance Co. of Cincinnati,	do	40	40,000 00
" "	John C. Wright,	do	24	24,000 00
" "	Winslow & Berkins	do	331	331,000 00
" "	Jas. Gregg Wilson,	do	3	3,000 00
" "	Sam'l White,	do	1	1,000 00
" "	Amos Willetts,	do	1	1,000 00
" "	Samuel Wiggins,	do	9	9,000 00
" "	Thurlow Weed,	do	5	5,000 00
" "	Silas Wood,	do	40	40,000 00
" "	Harvy Weed,	do	10	10,000 00
" "	John Ward & Co.,	do	30	30,000 00
" "	Hosia Webster,	do	5	5,000 00
" "	Thos. Yates,	Europe.	5	5,000 00
Oct. 1.	Edwin Crosswell,	United States.	5	5,000 00

The aggregate amount of bonds surrendered by the foregoing parties was eight million one hundred and fifty-nine thousand dollars, and the sum of ten per cent. on the same, or eight hundred and fifteen thousand five hundred dollars, was subscribed and paid as an advance for the completion of the canal to Evansville.

(Exhibit B.)

List of lands granted for the Wabash and Erie Canal, east of Tippecanoe, remaining unsold, with price per acre and total valuation.

Description of Tract.	Sec.	Town.	Range.	Acres.	Price.	Total value.
Lots 190 & 191 in 6 ch. strip of 5 mile res.,		27	4 E.	4 00	5 00	20 00
Lot 63 in 6 ch. strip Raccoon res.,		29	10 "	2 00	5 00	10 00
Lots 28, 29, & 31 " "		30	10 "	6 00	7 00	42 00
E. ½ of S. E. ¼,	32	30	11 "	55 44	3 00	166 32
W. ½ of S. E. ¼,	32	30	11 "	73 23	3 00	219 69
E. ½ of S. W. ¼,	32	30	11 "	80 00	5 00	400 00
E. ½ of N. E. ¼,	34	30	11 "	60 50	3 00	181 50
W. ½ of S. W. ¼	20	30	11 "	82 75	7 00	519 25
S. E. fr. S. of lake,	32	30	11 "	6 07	3 00	18 21
E. fr. of S. E. ¼,	34	30	11 "	64 17	3 00	192 51
S. W. fr'l ¼,	34	30	11 "	129 25	3 00	387 75
S. W. ¼; W. ½ of S. E. ¼,	9	31	15 "	240 00	4 00	960 00
S. E. ¼,	18	31	15 "	160 03	3 00	480 00
S. fr. (S. of W. R.),	8	25	2 W.	51 97	5 00	259 85
				1,015 38		3,917 08

And this cause is continued.

And afterwards, to wit, at the November term of said court, begun, holden, and continued before the Honorable Elisha M. Huntington, District Judge of the United States for the District of Indiana, to wit, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and fifty-eight, that being the eighth judicial day of said term.

Comes now the complainant by his solicitor and files his replication herein in the words and figures following, to wit:—

The replication of the complainant to the answer of the defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiency of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true.

All which matters and things this repliant will maintain, aver, and prove, as this court shall direct, and he prays as in and by his said bill he has prayed.

JER. SULLIVAN,
Att'y for Complainant.

And day thereof is given the parties.

And afterwards, to wit, on the twenty-seventh day of November,

in the year aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the honorable judge aforesaid.

Come now the parties by their solicitors, and this cause is submitted by agreement in the words following, to wit:—

In the above entitled cause the parties in modification of the bill and answer, agree to the following facts, and upon them and the bill, answer, and replication, the cause is to be submitted.

1st. That the complainant is the holder of the bonds and coupons attached in the bill described, and made exhibits in this case, and that the same, according to their tenor and purport were issued as in said bill as alleged by the State, and that the interest money on said bonds is unpaid, as charged in the bill, as appears by the coupons attached.

2d. That the complainant was an original subscriber of thirteen bonds of the State of one thousand dollars each to the trust now being established by the defendant, as in the answer is alleged; but whether the said bonds were 5 per cent. bonds or 6 per cent. bonds, the parties cannot now determine, but the fact shall be ascertained and filed herewith, a part hereof before final hearing. And that upon surrender of said 13 bonds to the State, he subscribed 10 per cent. to the bond to be used in the completing of the canal to Evansville, as in the answer is alleged. And it is agreed by the parties that all other matters in the bill, and not expressly traversed by the answer, are true, and that all statements of fact in the answer of the actions of others, places of residence, acts of the trustees, defendants and statistics shall be for the purpose of hearing of this cause upon the merits, be taken as true, so far as the same has or can have any application to the issue and merits of the case, or any equitable defence to the defendants.

It being the design, intent, and agreement of the parties to submit for the decision of the court, the question whether the complainant has the right to the assets in the hands of the defendants for the payment of his bonds and interest, notwithstanding the act organizing the trust, and the facts stated in the bill and answer.

November 27, 1858.

JER. SULLIVAN, Sol. for Pl'ff.

JOHN P. USHER, Sol. for Def'ts.

And afterwards, to wit, on the thirtieth day of December, in the year aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the honorable judge aforesaid.

Come now the parties by their attorneys, and this cause is continued.

And afterwards, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, at a Circuit Court of the United States aforesaid, begun and holden before the honorable judge aforesaid.

Comes now Joseph D. Beers and Charles Butler and file their agreement in the words and figures following, to wit:—

This may certify that the complainant, Joseph D. Beers, surrendered under the public debt act, so called, passed by the Legislature of the State of Indiana, internal improvement bonds of said State, Nos. 1237, 3501, 3502, 4494, 361, 363, 434, 25, 30, 31, 3503, 3504, 3505, in all, thirteen bonds issued under the act of 27 January, 1836, of one thousand dollars each, and bearing interest at 5 per cent. per annum.

Dated New York, 12th Feb., 1839.

(Signed) CHARLES BUTLER,

Trustee for Board of Trustees of Wabash and Erie Canal.

(Signed) J. D. BEERS.

And afterwards, to wit, on the twenty-fourth day of May, in the year last aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the Honorable John McLean, one of the Associate Justices of the Supreme Court of the United States, and judge of said Circuit, and the Honorable Elisha M. Huntington, District Judge of the United States for the District of Indiana.

Come now the parties by their solicitors, and after argument heard, the court give the parties further day to hear their decision thereon.

And afterwards, to wit, on the twenty-first day of June in the year aforesaid, at a Circuit Court of the United States aforesaid, begun and holden before the Honorable Elisha M. Huntington, District Judge of the United States for the District of Indiana.

Come now the parties by their solicitors, and this cause is continued under advisement.

And afterwards, to wit, at the May Term of said court, begun, continued, and holden, before the Honorable John McLean, one of the Associate Justices of the Supreme Court of the United States, and Judge of said Circuit, to wit, on the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and sixty, that being the fifth judicial day of said term.

Come the parties, and by leave of the court, and with the consent of the defendants, the complaint amends his bill, so as to include the interest on the said bonds up to the first day of January, 1860. And thereupon the court being sufficiently advised as to the decree they render in this behalf, do find that the complainant is the holder of the bonds numbered 69 and 70 mentioned in his bill, and that no interest has been paid on said bonds or either of them, since the first day of January, 1841; but that the said coupons, from the date last aforesaid, to the first day of January, 1860, now due and payable, and that the same has been duly demanded; which coupons and the interest thereon, amount to the sum of three thousand seven hundred and fifty-five dollars and sixty cents ($3755 60).

And the said trustees of the Wabash and Erie Canal pray that the decree and final determination aforesaid, for the errors aforesaid, and for other errors in said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that they may be restored to all things they have lost by occasion of the said decree and final determination, &c.

JOHN P. USHER,
Att'y and Counsel for Appellants.

1237

Supreme Court of the United States.

THE TRUSTEES OF THE WABASH AND ERIE CANAL,
vs.
JOSEPH D. BEERS.
} *IN CHANCERY.*

No. 112.

The governing facts in this case, not to be overlooked, are:

1st. The State of Indiana, by the 1st Sec. of the Act of 9th January, 1832, under which complainants lands were issued, contemplated a loan of $1,081,970—all to stand upon an equality of right and lien.

2d. It is alleged in the answer, and admitted to be true that when the trust took effect the whole available means and assets of the canal, lands, and proceeds of canal lands east of Tippecanoe river was $318,097.80, upon and against which there were near two millions of dollars of outstanding bonds of the State, that the holders of these bonds had equal rights with the complainants. That these bonds with the exception of $200,000 had been surrendered under the trust, and that there remained of this fund to be converted, only the sum of $30,000.

3d. Under the acts creating the Trust, there were surrendered of the bonds of the State, $8,159,000, independent of interest due. This surrender included $981,970 of bonds of the class of Mr. Beers, leaving $200,000 admitted to be unsurrendered.

4th. The holders of these surrendered bonds subscribed and paid 10 per cent. thereon, being $98,197, to the Trust for the purpose of making the property available which was surrendered with the bonds of their Trustees—of this advance they have been repaid by the Trustees less than one-third of the principals.

The whole advance was $815,900—repaid $244,770 only—and this the complainant admits.

5th. The acts creating the Trust expressly preserved the lien of the holders of the Wabash and Erie Canal bonds; the stock certificates contain the agreement transferring the canal, &c.; and this the complaintant knew was the effect of the acts, and he agreed thereto, by becoming a subscriber under them, aiding thereby in putting the acts in operation.

6th. The acts having been put in force by the instrumentality of complainant, the property must be distributed, and the Trust executed according to the acts, so far as he is concerned.

The 10th Sec. of the Supplementary Act declares the mode of distribution, and expressly excludes the complainant of all interest in the Trust, so far as these unsurrendered bonds are concerned. The 14th Sec. declares that the arrangement shall be inviolate, and the last proviso of Sec. 8 declares that no other provision will be made; showing conclusively that the Trust is not for the benefit of the unsurrendered bonds.

7th. The complainant being a party to the trust is bound to submit to its execution according to its terms.

8th. If he was not a party to the trust, he could not seize upon and convert the trust property in exclusion of the rights of the other non-subscribing bond-holders. They have equal rights with him. He has *two bonds*—they have *two hundred*. They should be parties. The fact is, that most of these two hundred are held by the United States as Indian trust lands.

9th. This is a trust where all persons interested must be parties. The fact that they are now resident, so that they cannot be made parties, only proves that the Court is without jurisdiction.

10th. The theory of the Complainant's bill is, that he has the superior right to every other bond-holder; indeed, he says so. But he says that others holding bonds of the same issue of his may participate, if they will contribute to the expense of the suit. This is an admission that there are other bonds outstanding of the same issue, and there is no reason given why they are not parties. The decree is for the benefit of Mr. Beers, without saving the rights of the absent bond-holders.

11th. The subscribers of the Wabash and Erie Canal bonds have the superior equity over Mr. Beers in this, viz: they had equal rights before they surrendered their bonds, but having surrendered, and advanced large sums of money, yet unpaid, and taken the trust property into the hands of their trustees, they have the equitable right to hold the property until they are repaid their advance, before Mr. Beers can be admitted to participate with them. He is estopped from saying it was an injudicious expenditure of money by the bond-holders to obtain the control of the pledged property, because he participated and encouraged the expenditure.

12th. It is an indisputable fact that the holders of the bonds of the same class of Mr. Beers', and having originally the same rights and equities, have, by his consent, through his and their trustees, (the defendants' herein) the trust property in possession to be converted to the payment of their bonds, and thus having the property by the consent of Mr. Beers, it is in vain for him to now attempt the overthrow and subversion of the contract of his own choice and making. And, moreover, if he could do that, nothing could be gained by him, as the parties agree that there are not assets sufficient to pay the advance of the bond-holders.

13th. The claim of Mr. Beers, when contrasted with the rights of the others, is trifling—in fact, the answer agreed to be true shows that there are no assets to which he has, or can have, any equitable interest, as against the subscribing bondholders, and a court of equity will not encourage such suits.

J. P. USHER.

J. D. BEERS,

vs.

TRUSTEES OF THE W. AND E. CANAL. } In Chancery.

The plaintiff is the holder of two bonds of $1,000 each, issued under the 4th and 5th sections of the Act of the General Assembly of the State of Indiana, entitled "An Act supplemental to an Act providing means for the construction of the Wabash and Erie Canal," approved January 9th, 1832.

By the 4th section of the Act, the Commissioners of the Canal Fund were authorized to borrow $200,000, on a credit of thirty years, at an interest of six per cent. per annum. (See Acts of 1832, p. 1.)

By the 5th section, all the moneys in any manner arising from the lands donated by the United States for the construction of the section of the canal therein referred to, the canal itself, with the portion of land thereto appertaining, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls, &c., were irrevocably *pledged and appropriated* for the payment of the principal and interest of the loan, and their sufficiency was guaranteed by the State.

The complainant has received no interest money since the 1st of January, 1841, on either of the bonds, and he now asks the Court to decree the amount due to him, calculating interest according to the laws of the State of New York, on the several semi-annual payments of interest from the time they became due and payable.

By an Act of the General Assembly of the State of Indiana, approved January 19th, 1846, the Legislature provided for funding the debt of the State of Indiana, and for

the completion of the Wabash and Erie Canal to Evansville. (See Acts 1846, p. 1.)

The 1st section of that Act commences with the following words: "Be it enacted, &c., That whenever the holder of any bond or bonds of this State (the bonds issued under the original bank charter excepted), shall *choose* to surrender the same up to the State, there shall be issued to such holder a new certificate of stock," &c. The act then provides for issuing new certificates of stock to those who do surrender—what interest the new stock shall bear—when and where payable, &c.

The 7th section provides for the appointment of a board of trustees of the Wabash and Erie Canal, the tenure of office, &c., and the 8th section requires the Governor of the State to execute and deliver to the said trustees, by the corporate name of the Board of Trustees of the Wabash and Erie Canal, a deed or patent for the bed of the canal and its extensions, finished and to be finished, from the Ohio State line to Evansville, including its banks, margins, &c., and all materials provided or collected for its construction, and all the property, right, title, and interest of the State in and to the same, with all its appurtenances; also, all the lands and lots (not sold or disposed of) heretofore given, granted, or donated by the General Government to the State, to aid in the construction of said canal, or *any part of it;* all moneys due or to grow due on amount of existing leases of water-power, &c., "*subject, nevertheless, to all ex-*
"*isting rights and equities against the State, on account of*
"*the same, or any part thereof, or liabilities of the State,*
"*growing out of, or in relation thereto.*"

With the property so conveyed, the trustees were to pay this newly funded debt.

On the day of , the Governor executed to the trustees a deed, pursuant to the requirements of the statutes as above recited, and the trustees, instead of paying the interest on the bonds *first* sold, and for the payment of which said property, or the great part of it, was pledged by the act of 1832—instead of regarding the rights and equities protected by the 8th section of the act of 1846, above referred to, refused to pay any part of the interest on the first issue, thus trying to compel the

holders of the original bonds to surrender them, and abandon their lien, contrary to the plain intent and meaning of the act.

The Act of 1832 was a contract with J. D. Beers and those who purchased bonds under that act. The security given them for their money was the very property now held by the defendants under and by virtue of the deed from the Governor of the State, and the plain and simple question is, Can J. D. Beers follow that property into the hands of the present defendants, who hold it with notice of his equity?

On general principles there is no doubt but that he can do so,—but the defendants contend that he is *estopped* from proceeding because he consented to the act of 1846 by surrendering thirteen bonds and paying his proportion of the money named in that act as needed for the completion of the canal to Evansville. This cannot be so. The bonds he surrendered were 5 per cent. bonds, issued under the act of 1836, and the money he advanced, as well as the money advanced by others under the act of 1846, was a new loan, and for both of which, i. e. the bonds surrendered and the money advanced by him, he received new certificates of stock, bearing the same interest as the surrendered bonds bore. This cannot affect, in any way, his right to enforce a prior and wholly independent contract. There is, therefore, *no estoppel*.

The defendants further say, that the relief prayed for by the complainant should not be granted because there are others, to wit, the holders of the new certificates of stock under the act of 1846, that have equities equal to the complainant. I need not deny here that the holders of said certificates have rights which, at the proper time and upon a proper case made, the Court will regard and protect,—but I deny that, in the present proceeding, they have equities *equal* to the complainant.

This case may be assimilated to a case of first and second mortgagees. In such case the Court will protect the rights and equities of both, but in doing so the prior mortgage will be preferred in payment. It would be inequitable not to do so. (White Water Val. Canal Co. *v.* Vallette et al. 21 Howard's Rep., 414, and cases cited.) So in this case.

The holders of the *stock certificates* have a second lien on the same property that is pledged (or mortgaged) for the payment of the plaintiff's debt. They must be postponed to the prior incumbrance in favor of the complainant, of which they had notice. The statute being a public act, is notice.

The Courts adjust equities according to priority, unless there be fraud.

The fallacy of the argument for defendants consists in assuming that there was a *trust* created by the act of January 19th, 1846, which swallowed up all previous equities. If there was a trust created by that act, it was subordinate "to all existing rights and equities," by the express provision of the statute; and those who surrendered bonds and paid money under the statute, did both with the knowledge of that fact. This is shown by that provision in section 7 of the act, which I have quoted above.

The defendants also say that the complainant, Beers, was instrumental, by the surrender of his six per cent. stock, in creating a trust which he now seeks to destroy. Here is a mistake. Beers did *not* surrender any portion of his stock issued under the act of 1832, the first stock issued by the State of Indiana. He surrendered, as above stated, 5 per cent. stock issued subsequently. If, however, Beers had surrendered *a portian* of his 6 per cent. stock, and had retained *a portion*, I do not suppose that such surrender would affect or impair his prior equity as to the portion not surrendered.

The Court will find in the record an agreed statement of facts, marked No. 2, to which I refer.

Jos. Sullivan.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty.

SUPREME COURT,

OF THE UNITED STATES.

JOSEPH D. BEERS,
Respondent,

vs.

THE TRUSTEES OF THE WABASH AND ERIE CANAL.

No. 206.—DECEMBER TERM, 1861.

Appeal from the Circuit Court for the District of Indiana.

Beers filed a bill in equity, in which he stated that he was the holder of two certain coupon bonds issued by the State of Indiana, in 1832, which were authorized by the act of her Legislature proper, January 9th, 1832. As security for the payment of the accruing interest and the principal, said act irrevocably pledged and appropriated all the moneys to arise from the lands donated by the United States for the construction of the canal, and the canal itself, with the rents and the profits thereof.

That, by virtue of laws passed by said State in 1846 and 1847, the said canal and unsold portion of said lands were conveyed to the said trustees, subject to the rights and equities against the State on account of the same, and that said trustees accepted and held the same in trust.

That said trustees then held the whole or the greater part of the property so conveyed, and that, by the terms of

the conveyance, one of the objects was the payment of the liabilities of the State incurred in the construction of said canal, and among them the bonds held by complainant. That the State had wholly failed to pay the interest on said bonds held by him since 1841, and that when said trustees received the conveyance of said property, they knew that said interest had not been paid, and knew of the rights and equities of said complainant as a bondholder.

That the said trustees had received from the trust fund in their hands moneys more than sufficient to pay the interest due him.

The bill prayed for a decree declaring said bonds, and interest due thereon, to be a valid lien upon the said canal and lands, and the profits of said canal, and that the amount thereof be paid by said trustees, and in default thereof, that a receiver should be appointed.

To this bill the defendants filed a demurrer, which was overruled, and afterwards filed an answer, which, after admitting certain moneys in their hands, sets up, among other things, the following facts, by way of defence:

1. That they received the said trust fund, under the act of 1846, discharged of all equitable lien in favor of Beers, under the act of 1832.

2d. That under the act of 1846, the bonds of the State, previously issued to a large amount, were funded and moneys advanced to aid in completing the canal to Evansville, and that those whose bonds were so funded had a lien upon the trust fund in their hands, and an equal equity with Beers.

3. That Beers had funded thirteen one thousand dollar bonds, and advanced ten per cent. on their amount, under the act of 1846, relating to certain internal improvements, which was a lien upon the trust fund in their hands, and that he was, therefore, estopped from claiming an equitable right under the act of 1832, as to the two bonds.

The complainant filed a general replication. By stipulation afterwards filed, the following facts were agreed upon between the parties (R., pp. 26, 27):

1. That the complainant was the holder of the two bonds described in the bill, and that the interest was unpaid since 1841.

2. That the complainant was the holder of thirteen five per cent. internal improvement bonds, issued by the State of Indiana, of one thousand dollars each, issued under the act of the 27th of January, 1836.

3. That all the averments in the bill not expressly denied were admitted to be true.

It is stated that it was the design of the parties to submit, for the decision of the Court, the question whether the complainant had a right to the assets in the hands of the defendants for the payment of his bonds, and interest thereon, or not.

The Court below held that the bonds were a lien upon the property conveyed by the Governor, under the act of 1846, to the trustees, and made a decree in favor of the complainant for the amount due, and with leave to apply to the Court for the appointment of a receiver to take charge of the trust property, in case the amount was not paid within a specified time.

From this decree the trustees appealed to this Court.

Points.

First.—*The complainant, as the holder of the two bonds in question, issued by the State of Indiana, under the act of* 1832, *had an equitable lien upon the canal and lands conveyed to the defendants under the act of* 1846, *and now held by them in trust, which can be enforced in equity.*

It is admitted that these two bonds were issued by the State under the act of 1822, and that they are held by the complainant.

That said act pledged the canal and lands for the payment of the interest and principal of the bonds issued under

it. This pledge created an equitable lien in favor of whoever might hold any of such bonds. The complainant being the holder of two of these bonds, has such a lien. The statute under which these bonds were issued places this question beyond doubt. Its provisions applicable to this question are as follows:

Act of August 16th, 1832, p. 3–4.

The first section adopts a certain location for the canal, and the second constitutes the canal fund, and provides for the appointment of commissioners, &c. The fourth prescribes the mode of affecting the loan, and how long it shall run. The fifth, the material one, is in these words:

"§ 5. *That the payment of the interest, and the redemption of the principal of the sums of money, which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this act stated, there shall be and are hereby irrevocably pledged and appropriated, all the monies in any manner arising from the lands, donated by the United States to this State for the construction of said section of said canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof, as finished; the sufficiency of which, for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee.*"

This is an unqualified equitable pledge, which no legal subtlety can pervert. It was set out in the bond itself, and formed a part of that instrument, inviting purchasers, and offering them ample security. The obligation of the State, and the pledge of the means of payment, were distinctly made known to the subscribers at the time of the purchase. The State took special pains to notify purchasers of this special statutory pledge. It tended to promote sales, and probably added to value of the bond.

In *Rector* v. *Philpot*, 12 Rice R., 197, there was no statute pledge, the transaction being between private parties. But the bond recited that the obligor's freehold and leasehold estate should stand pledged, and the borrower handed to the obligee his title deeds. This was held to give the payee of the bond an equitable mortgage, entitling him to a preference over all subsequent liens, and which could be enforced in equity.

This has been the rule in this country and in England, wherever the court could see that it was the intention of the parties to create a lien, or otherwise confer a preference or give a pledge, and particularly where the debt was created, in consequence of the pledge being put forth as an inducement for entering into the contract.

This act creates a valid equitable interest upon the canal and lands, &c., in the holder of these bonds, which equity will enforce

In *Seymour* v. *The Canandaigua and N. F. R. R. Co.*, (25 Barbour S. C. R., 284, p. 302,) it was held that an agreement for a lien creates one which can be enforced in equity, and is superior to, and must prevail, over the liens created by a judgment.

In *Fremoutt* v. *Dedire*, (1 P. Williams, 429,) it was held that where marriage articles had provided a lien upon land, it was superior to the claims of creditors.

In *Fitch* v. *Creighton*, (24 How., 159,) where the statutes of Ohio authorized the city of Toledo to cause certain improvements to be made, and to assess the expense upon lands fronting the streets improved, which assessments had been assigned by the city to the person who made the improvemets, it was held, that the latter acquired an equitable lien upon the lands which could be enforced in equity.

In the case of the *White Water Valley Canal Company* v. *Vallett* (21 How., 414–422), the faith of the company, and their effects, real and personal, were pledged for the payment of certain bonds issued to Vallette and the interest accruing thereon. A bill was filed to enforce the lien

thus created, and the Court held: "In the absence of objections to the validity of these bonds, there can be no question concerning their legal operation and effect, or of the jurisdiction of a Court of Equity to enforce them. That Court treats an agreement for a mortgage, or pledge of bonds, or other property, as binding, and will give it effect according to the intentions of the contracting parties."

In *Duncan* v. *The Company of Proprietors of the Manchester & Salford Water Works*, 8 Price R., 697, and in *Rector* v. *Philpot*, 12 Rice R., 197, this doctrine was established in the English Exchequer Court, and in the latter case, against the adverse claims of the King.

If these cases are law, the complainant's lien cannot be the subject of controversy.

Second.—*The act of* 1846 *could not take from the holders of these bonds any right which they had acquired under the act of* 1832.

The act of 1832 conferred certain rights upon the bondholders. These rights were a matter of statute contract, binding upon the State, and which could only be released by the intentional act of the holder himself, in the form of a legal modification or discharge of the contract. Such a contract cannot be changed where the party does not intend it, nor without some act on his part which shows that he and the State had made a new or different contract to take its place. The State alone could not change it.

The Constitution of the United States, Article I., Sec. 10, declares that no State shall pass any "law impairing the obligation of contracts."

The decisions under this provision are numerous, and many of them recent.

The case of *Fletcher* v. *Peck* (6 Cr., 87), involved the question of the power of the Legislature of Georgia to repeal a statute under which rights had become vested in

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Yazoo lands. The Court held that "when a law is, in its nature, a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights. A party to a contract cannot pronounce its own deed invalid, *although that party be a sovereign State.*"

In *Terrett* v. *Taylor* (9 Cr., 43), the same rule was laid down in relation to the action of the Legislature of Virginia, concerning glebe lands.

In *Woodruff* v. *Trapnal* (10 *H.* 190), the Legislature of Arkansas had provided that State bank bills should be receivable for all dues to the State, and it afterwards repealed this clause. This repealing act was held to be unconstitutional, because it impaired the obligation of a contract.

In the *Dartmouth College* case (4 Wh., 518), it was held that the Legislature of New Hampshire could not, without the consent of the corporation, materially alter its charter.

Bronson v. *Kenzie*, 1 H., 311.
Farmers & Mechanics' Bank of Pennsylvania v. *Smith*, 6 Wh., 131.
Sturgis v. *Crawrinshield*, 4 Wh., 122.
Gordon v. *Appeal Tax Court; Cheston* v. *Same*, 3 H., 133.

If these cases are not overruled, this Court must hold that the Legislature of Indiana was prohibited, by the federal constitution, from making any change in its laws, by which said canal and lands were discharged from complainant's lien, or the complainant's rights in any way affected.

Third.—*The act of* 1846 *did not, by its terms, discharge the lien of the bondholders under the act of* 1832, *upon the fund transferred by the State of Indiana to said trustees.*

The act of 1846 was not intended to violate the legal

rights of bondholders under the act of 1832. Those who had acquired rights, as owners of bonds issued under that act, were entitled to all the rights and security which it conferred. The Legislature knew it could not change those rights by its own act, and, therefore, it made ample provision for their protection in the act which authorized the transfer of the interest of the State to the said trustees of the said canal and land. The statute upon this subject contains the following provisions:

Law of January 29th, 1846, page 1, and subsequent.

Section one authorizes those who *choose* to do so, to surrender their bonds, and receive certificates bearing *five per cent. interest.*

Section two provides how the certificates shall be signed and numbered.

Section three declares the time of payment of the interest on coupons.

Section four provides that transfers of certificates are to be made in New York.

Section five specifies when interest on the new stock is to be paid, and for the payment of certain portions of the interest and redemption of principal the faith of the State is pledged in the manner therein stated.

Section six provides for the bondholders making provision for raising among themselves the means of completing said canals.

Section seven provides for the election of trustees, and the tenure of their office.

Section eight provides as follows:

"So soon as the said trustees shall have been elected, or appointed, as aforesaid, it shall be the duty of the Gov-

ernor, in the name and under the seal of the State, to execute and deliver to the said trustees, by the corporote name of the Board of Trustees of the Wabash and Erie Canal, a deed, or patent, for the bed of the Wabash and Erie Canal, and its extensions, finished and to be finished, from the Ohio State line to Evansville, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water-power, and structures, and all materials provided or collected for its construction; and all the property, right, title, and interest of the State, in and to the same, with all its appurtenances; and also, all the lands and lots (not sold or disposed of) heretofore given, granted, or donated by the general Government to the State, to aid in the construction of the said canal, or any part of it, or which may hereafter be required, under or by reason of any existing grant, and all moneys due or to grow due, and remaining unpaid, on account of any sale or sales heretofore made of any canal lands so donated, and all moneys due, or to grow due, on account of any existing leases of any water-power or other privilege on said canal, its side-cuts, feeders, basins, or other appurtenances; said trustees to have, hold, possess, and enjoy the same as fully and absolutely as the State can or could be: *subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of, or in relation thereto,* and the same to be held by said trustees in trust and security for the uses and purposes following," specifying the mode of application of said proceeds to the completion of the said canal and branches, keeping them in order, and paying the new stock and interest thereon, which was to be paid by the trustees.

By the 13th section it is declared that the faith of the State is in noways pledged to meet the two and a half per centum of interest, unprovided for by the previous provisions, guaranteed to be paid by the State, but under this act to be paid by said trustees.

There is an express limitation of the authorized grant, making it expressly subject to all the previous rights and

equities against the State on account of its liabilities growing out of the construction of said canal and branches.

The trustees, under this law, took with full knowledge of the rights of all those who had not surrendered their old bonds, which were equitable liens on the trust fund, and had taken new ones, with a modified lien, under this act of 1846.

If this act of 1846 had not made this exception in favor of bondholders, who did not surrender old bonds, and take new ones, the rights of the complainant would have been the same, without the notice contained in the act, and the limitation of the grant contained in the deed, or resulting under the law authorizing the conveyance to him.

This point was adjudicated in *Rector* v. *Philpot*, 12 Price, 197, even against a subsequent lien by the King, by judgment, and that this lien continued after a new lease of the property had been made.

This act of 1846 was amended in 1847, but not so as to affect the present question.

Fourth.— *The complainant, by finding bonds under the act of* 1846, *issued under the act of* 1836, *is not precluded or estopped from claiming and asserting his rights, and enforcing liabilities, under the act of* 1832.

The rights accruing under the act of 1836, *are not identical* with those arising under the act of 1832, the latter being the oldest, and therefore superior. Funding bonds under the act of 1836 cannot affect vested rights under the act of 1832. The latter, when issued, became effective as liens, and were irrevocable, which the Legislature could not change. The rights of the holders of the bonds of 1832, when once fixed, could not be changed without their express and direct assent. The State of Indiana had no power to change the contract, nor defeat the lien. No law was or

could have been enacted changing the character of the State's indebtedness. Funding bonds under the act of 1846, only affected the bonds so funded.

If the bonds funded had been of the emission of 1832, that fact could not affect those which complainant held and did not fund. The assent to the act of 1846 could be no broader than his act in funding. He was free to fund, or not, as he chose. If he funded any, it constituted a new contract, and can be no broader than complainant made it.

The doctrine of estoppel has no applicability to this case. It can never be resorted to for the purposes of injustice or wrong, much less to make, or enlarge, or modify a contract, and deprive a party of rights legally belonging to him. Neither the State nor the trustees were induced to advance money or do any act in consequence of the complainant funding a portion and not all of his bonds.

The position now assumed by the trustees is substantially this—the complainant having consented to receive inferior security, as to a portion of the bonds held by him, he shall be deprived of good security for another portion, although he did not so intend, and the trustees have not performed any act, or lost, or been deprived of any right in consequence of it.

The act approved Januury 27, 1836, (Laws of 1836, p. 3,) provides for a general system of internal improvement, and for a board to construct *canals, railroads, and turnpikes* therein specified, and establishes an internal improvement fund for the purposes of the act. Section 8 authorizes a loan of $10,00,000 for twenty-five years, at 5 per cent. interest.

The 9th section is as follows:

§ 9. "For the punctual payment of the interest and final redemption of the principal of all sums of money which may be borrowed under the provisions of this act, there shall be, and are hereby irrevocably pledged and appropriated *the canals, railroads, and turnpike roads, with the portions of ground thereto appertaining and privileges thereby created, and the rents and profits of the water power*

thereof, together with the net proceeds of tolls collected thereon, and the sufficiency of which, for the purposes aforesaid the State of Indiana doth hereby irrevocably guaranty."

This pledge is essentially different from that contained in the act of 1832, which includes *the public lands donated to Indiana by the United States for the purposes of internal improvements*, which are omitted in this act.

It is perfectly apparent, from this citation from the act itself, that it was not intended to affect the rights of bondholders beyond their free assent. It, in terms, provides for the surrender of bonds by those who "shall choose to surrender the same to the State." If a holder does not "choose" to surrender and release the State in part and take the trustees for part, the law does not assume to compel him to do so. It does not say, that he who chooses to surrender a part, shall surrender all, or be barred. No one can say that these unsurrendered bonds stand upon the same ground as the surrendered ones. Their *time of payment*, *rate of interest*, and *obligations to pay*, are not the same. New stock cannot be issued until the old is surrendered, and new obligations cannot arise until the new stock is issued. If the complainant cannot enforce his rights under the old bonds, then he is without remedy. He can only secure one to himself by entering into a new contract, *agreeing to adance more money, wait longer for his pay*, and to trust to the management of the trustees of the canal and lands, for a portion of their interest, which they may never make and pay over. This change in the terms of a contract, complainant is not obliged to submit to, further than he may "choose."

Fifth.—*The equitable interests of the bondholders under the act of* 1846, *was younger than that of those who held bonds under the act of* 1832, *and, consequently their interests were subordinate to those accruing under the latter act, and only to be paid when those under the act of* 1832 *were discharged.*

It is a familiar rule in equity, that the oldest equitable interest is first to be attended to and discharged, and that the younger must be postponed until this is done. It is like the case of mortgages, where the rights of the junior are subordinate to those of the senior mortgage. A valid senior equitable right is first to be paid.

This rule was established in this Court as early as the case of *Fitzsimons* v. *Ogden*, 7 Cranch, 1, p. 18, where it is said that "he who has the precedency in time, has the advantage in right." The rule was repeated in *Boone* v. *Chiles*, 10th Peters, 177, p. 210, where it was stated, that the general principle in Courts of equity, was "that where both parties claim by an equitable title, the one who is prior in time, is deemed the better right."

See *Anderson* vs. *Roberts*, 18 John R., 532, 1 Fonbl. Eq., 320.

The rule here laid down is of universal application, and is without exception. It must be enforced, because it is, in effect, a part of the contract—the law entering into and forming a part of every contract, and the courts must execute the contract as they find it. They have no power to modify, or alter it. Nor will they sanction the effort of either party to do so, without the consent of the other.

The defendants suggest that those who surrendered their bonds, and took new stock under the act of 1846, have an interest in the fund, and should be made parties and protected.

The answer to this is, that they knew the provisions of the acts of 1832 and 1836, and those of the act of 1846. They voluntarily relinquished their rights under the former, and acquired others under the latter. Under the act of 1832, they stood upon the same ground as the complainant. They preferred to relinquish their rights under it, for supposed advantages, held out under the act of 1846. They gave up bonds containing the old pledge, and took those issued under the subsequent act, the existence and terms of which they cannot deny, having full knowledge, which expressly reserved all the rights then existing in favor of those holding the old bonds.

Their rights upon the fund are not questioned, but it is

insisted they are postponed to those who hold the old bonds; they voluntarily placed themselves in this position, and neither they, nor the trustees, or the State, can change it. When the old bondholders, who pursue their equitable remedy, have realized their dues, the residue of the trust fund will be subject to the claims of the new bondholders, but not before. They have no present rights, and need not be made parties.

The first duty of a Court is to ascertain from the facts in the record, what the agreement of the parties is, and then to declare their respective rights under it. Neither can be allowed any advantage, from his efforts to change the contract, without the consent of the other, or from special devices to which he may resort, in its violation. If this course shall be pursued in this case, as it doubtless will, the complainant must recover—the decree below must be affirmed.

Dated 12th February, 1862.

R. H. GILLET,
Of Counsel for Beers.

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Circuit Court of the United States,

DISTRICT OF INDIANA.

Joseph D. Beers, *vs.* The Board of Trustees of the Wabash and Erie Canal.	In Chancery.

McLean, Justice.—The complainant in this cause is the owner and holder of two bonds for one thousand dollars each, issued by the State of Indiana under the law of January 9th, 1832, and his object in this proceeding is to subject certain property in the possession of the defendants to the payment of these bonds; there seems to be no dispute as to the facts, as the parties have submitted an agreed statement in writing, and it only remains for the Court to adjudicate the law upon these facts. The bonds held by the complainant, it appears by the bill, and is admitted by the defendants, were issued by the State of Indiana, under the law of Jan. 9th, 1832, and in all respects conform to its requirements. That act authorized the proceeds of certain lands donated by the United States for the construction of the Wabash and Erie Canal, and the canal itself to be irrevocably pledged and appropriated for the payment of the principal and interest of the loan for which these and similar bonds were issued, and accordingly the bonds contain the following provision: "And that for the payment of the interest, and the redemption of the principal sum aforesaid, there are irrevocably pledged and appropriated all the moneys to arise from the lands donated by the

United States for the construction of the canal itself, with the rents and profits thereof belonging to the State, the sufficiency of which the State of Indiana irrevocably guarantees." Subsequently to the issuing of these bonds by the State, and their coming to the possession of the complainant for full value, the Legislature passed an act to provide for funding the debt of the State, and to complete the Wabash and Erie Canal, which was approved January 19th, 1846. This act provided "that whenever the holder of any bond or bonds of this State (the bonds issued under the original bank charter excepted) *shall choose* to surrender the same up to the State, there shall be issued to such holder a new certificate of stock, &c." This Act further provided for the appointment of trustees, to whom the Governor of the State was required to convey, by deed or patent, this canal, and all the property heretofore pledged for the payment of these bonds, with, however, the reservation contained in the words of the law, as follows: "*Subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto.*" In pursuance of the provisions of this act, a board of trustees were appointed, and the Governor of the State made a conveyance to them of the canal, and all the lands, as therein provided. Under the provisions of this law for funding the State debt, many persons surrendered their original bonds, and, as required by the act, made an advance of money in a fixed proportion, and in lien thereof received new certificates of stock.

The complainant, it appears, was the holder of thirteen bonds of the five per cent. issue of the State, besides those set forth in this bill of complaint, and he surrendered these thirteen bonds, and made the cash advance as required by law, and received for these bonds and cash new certificates of stock.

Under this state of fact, it remains to be determined what rights, if any, the complainant has to subject to the payment of his bonds the property now in the hands of the defendants.

There can exist no doubt as to the rights of the complainant prior to the law of January 19th, 1846. By the act

of 1832, the State of Indiana had authorized a loan to be made, and for the payment thereof had irrevocably pledged the proceeds of all the lands donated by the United States for the construction of the canal, and the canal itself. The complainant, relying upon the pledged faith of the State, contained in the provisions of the law, as well as in the terms of the bonds, subscribed to the loan, parted with his money, and received in return the bonds set forth in the bill. That the State had the full power to make this pledge, there can be as little doubt as there is of the fact itself, that the pledge was made, which is apparent upon the face of the bonds. Neither can there exist any doubt, nor, in fact, does it appear to be controverted, that the pledge contained in the bonds were from the time of their execution and issue to *bona fide* holders for value, an existing and binding lien upon the canal, and the proceeds of the land donated by the United States for its construction. The State, by virtue of the law of 1832, made a solemn contract with the holders of these bonds, which was as binding and obligatory as the contract of an individuvl. The State cannot by subsequent legislation invade the rights guaranteed to parties who purchase these bonds. It is a contract made by the State in the most solemn manner known to the law. Its inviolability is guranteed to the citizen by the Constitution of the United States, and no change can be made in the rights acquired under this contract which will go to destroy its validity. If then, the law of 1846, which provided for funding the debt of the State Indiana, had taken away absolutely in terms the lien existing upon this canal and these donated lands, by virtue of the law of 1832, and the terms of the bonds in conformity thereto, it would have been a harmless enactment, and of no validity, for the reason that the constitution of the United States forbids the passage of any law which invalidates an existing contract. But the law of 1846 did not destroy the lien which existed as the security for the bonds; for the conveyance of this canal, and these lands under that law by the governor of the State to the board of trustees of the Wabash and Erie Canal was made expressly subject to all existing rights and equities, and thus the rights of the bondholders were saved, whatever they might be. The defend-

ants, the board of trustees for the Wabash and Erie Canal, then received these lands subject "to all existing rights and equities against the State on account of the same, or any part thereof," and, therefore, subject to the equitable lien of these bondholders; for the State had already contracted with them that this canal, and the proceeds of these lands should be irrevocably pledged for the redemption of the principal and interest of these bonds.

If nothing, therefore, has been done by this complainant by which he has forfeited or surrendered this lien, it follows as a matter of course that he can now enforce it by the aid of this Court. But it is contended, that the complainant has by his acts forfeited or surrendered his priority of lien, which was given him by the bonds in this; that he accepted the law of 1846 for funding the State debt, and made himself party to the scheme therein laid down, by surrendering thirteen bonds, and advancing his proportion of money as required, and accepting therefor new stock. It is claimed that this act of surrender of a different class of bonds from those mentioned in the bill estops the complainant from enforcing the lien which he possessed, as he is now seeking to do, by the aid of this Court. It is claimed that by surrendering his thirteen bonds he aided in the creation of this trust now being executed by the defendants, and that he cannot now be permitted to come in and destroy it, and thus commit a fraud upon those holders of bonds who have united with him in the surrender. The force of this reasoning is not perceived under the state of facts as they exist by the agreement of the parties. The complainant was the owner and holder of thirteen bonds of a different class from the two now sued upon, which were issued under a subsequent law, and these bonds he chose to surrender, as he had a right to do under the law of 1846. By the express terms of that law the option was left with the holder, whether he would convert any of his bonds, and it is but giving a fair and reasonable interpretation to the law to say that under its provisions the holder might convert the whole, or any part of his bonds according to his own pleasure. Neither can those parties who did surrender their bonds claim that the complainant would commit a fraud upon their rights, if he is

permitted to enforce his present claim prior to theirs; for the simple reason that they do not occupy the position of innocent parties without notice. They must be presumed to have full knowledge of the law of 1846 for funding the debt of the State, and that law expressly preserves "all existing rights and equities" of bondholders. How, then, can it be claimed that they are innocent parties without notice? The law provides for the funding of the debt of those bondholders who may *choose* to come in, and hence they might well suppose that some would not avail themselves of the provisions of the law, and if with this knowledge these bondholders chose to surrender their bonds, they knowingly run the risk of the enforcement of just such claims as the one now presented to the Court by the complainant. It is not perceived, how, under the facts and circumstances the complainant can be estopped from enforcing his prior claim. If other parties have surrendered their bonds and advanced their money, under the expectation that the complainant would fund the whole of his bonds because he had funded a part, they must have known that such an expectation might not be realized, as there was no power to compel such action on his part, and if they have taken the risk, their conduct in this regard cannot destroy the right of the complainant to enforce his claim.

In looking over the whole case, we cannot see that the complainant has forfeited his lien, and we must, therefore, give him such a decree as will secure to him the full benefit of the lien guaranteed by the law of 1832, and the terms of his bonds.

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In looking over the whole case, we cannot see that the complainant has forfeited his lien, and we must, therefore, give him such a decree as will secure to him the full benefit of the lien guaranteed by the law of 1832, and the terms of his bonds.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

THE TRUSTEES OF THE WABASH AND ERIE CANAL, *Appellants*,
vs.
JOSEPH D. BEERS, *Appellee.*

APPEAL from the Circuit Court of Indiana.

Beers, the appellee, is the holder ef two of the bonds of the State of Indiana, issued under the act of 9th of January, 1832, (page 3 of act of 1832.) By that act (sec. 4) provision is made for borrowing $200,000, for the payment of which the proceeds of the sales of the lands donated by the United States (March 2, 1827,) to the State of Indiana were to the extent of the estimated cost thereof, in the first section of the act, stated at $1,081,970 00, pledged and irrevocably appropriated.

Afterwards, the State contracted other loans to the extent of several millions of dollars upon the credit of the lands and the faith of the State; $8,159,000 of which, as set forth in the answer of the Trustees, were surrendered to the State by the holders under and by virtue of the acts of the State, popularly called "*the State Debt Acts*," passed the first January 19, 1846, and the second, a supplementary act, January 27, 1847. The holds of those bonds at the time of the surrender, subscribed, as by the acts they were required, $815,000 to the fund for the completion of the Canal to Evansville. Among these subscribers was Mr. Beers, he being among the first to subscribe 10 per cent. upon thirteen bonds of $1,000 each, and surrender them under the act; but it now appears that he withheld these

two bonds of $1,000 each, and after thirteen years alleges that the trust created by those acts was all the time misunderstood, and that in point of fact it was for the benefit of the holders of bonds of his class, to the exclusion of those who had surrendered, and that the acts are to be so construed.

He bases his claim first, on the act of 19th of January, 1832, which irrevocably appropriates the proceeds of the sales of the lands to the payment of the $200,000 of bonds to be issued, of which his are a part. Second, upon a proviso in the 8th section of the act of the 19th of January, 1846, under which the defendants are incorporated; the clause of the section is set out in the bill, and is as follows, viz.: "Subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto." Complainant claims that this clause refers to and covers his bonds.

As the case must therefore turn upon the construction of the acts incorporating the defendants, an examination of them becomes important to determine whether complainant's construction is correct, and if so, whether he has not waived the benefit of that construction by voluntarily becoming a party to the acts, and if he has not, whether the Trustees are bound to appropriate the assets of the trust in their hands to his benefit to the exclusion of other holders of bonds in like manner situated, and more particularly to the exclusion of the holders of certificates for surrendered bonds of the character of the complainant's.

The defendants contend that Mr. Beers has no equity whatever in his case. That it would be gross injustice to wrest the remaining assets of the trust to the payment of unsurrendered bonds, leaving the subscribing and advancing bondholders unpaid; and, moreover, that complainant having become a subscribing party is estopped from a diversion of the trust, and unless it is certain that the acts of 1846-7 require his bonds to be paid as the Court below have decreed, the Trustees insist that the bill be ordered to be dismissed.

The attention of the Court is directed to the acts under consideration. The title of the first is:

"*An act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville.*"

The preamble of the act, among other things, declares that, whereas this proposition embraces as a general arrangement the payment by taxation of two and a half per cent. on the unprovided public debt of the State, and a reliance for the remaining two and a half per cent. on the lands, tolls and water rents of the Wabash and Erie Canal, (after paying expenses, &c.)

The first section provides for the surrendering bonds of the Strte, except those issued under the original bank charter, and for the issuing of certificates stock.

The first section of the amended act of January 27, 1847, qualifies this section and provides for issuing certificates of equal moieties, one to be charged upon the canal and the other to be paid by the

State; and for the part charged upon the canal, certificates of stock were required to be issued in the following form:

"$,000 NO.

UNITED STATES OF AMERICA,
STATE OF INDIANA.
Five Per Centum Canal Stock.

Under two acts of the General Assembly of the State of Indiana, entitled an act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville, passed nineteenth of January, 1846, and an act supplementary to said act, passed January 27, 1847.

Principal chargable on the Wabash and Erie Canal, tolls, land, &c., pursuant to acts of the Legislature of Indiana, passed the 19th of January, 1846, and on the 27th of January, 1847.

Be it known, That the Wabash and Erie Canal, and all tolls, lands, and effects appertaining thereto, from the State line to Evansville, on the Ohio River, as described in the above mentioned acts of the Legislature, and all the property of the State of Indiana therein, are irrevocably pledged, by virtue of said acts, to A. B. and his assignees for the sum of one thousand dollars represented by this certificate, (forming part of the bonds of the State declared to have been surrendered by an act of surrender of this date,) together with interest upon the same at the rate of five per centum per annum from the first of January, 1847, payable semi-annually by equal payments at the time, and in form and manner prescribed in the act of the Legislature of the State of Indiana above mentioned." Pages 35 and 36 of the acts of 1847.

By the fifth specification of the 8th section of the act of 1846, and the 10th section of the supplemental act providing for the scale of distribution of the tolls and revenues of the Canal, express provision is made for preserving the priority and rights of the holders of the Wabash and Erie Canal bonds. (See vol. 4 Ind. Rep., page 495.)

Thus it will be seen that though the holders of the original bonds, having a lien upon the lands, canal, &c., did surrender their bonds and took new certificates; yet they did not surrender, or in any manner abandon any lien they had on the Canal or lands; but the 10th subdivision of the 10th section of the supplementary act expressly provided: "Saving the just rights of the holders of bonds now outstanding and known as the Wabash and Erie Canal bonds, as provided for in the 8th section of this act;" and this saving clause, by the decision of the Supreme Court just cited, controls the whole scheme and order of distribution of the assets and incomes of the trusts, and protects the surrendering holders of the Wabash and Erie Canal bonds, being bonds of the same character of the complainant's. If this decree is affirmed, that decision is, in effect, overthrown.

The act of January 6, 1832, under which the bonds of Mr. Beers was issued, pledges the canal and lands for their redemption in the following language:

"Sec. 5. That for the payment of the interest and the redemption of the principal of the sums of money which may be borrowed under the authority of the Generrl Assembly, for the construction of said canal, to the extent of the estimated costs thereof in the first section of the act stated, there shall be, and are hereby irrevocably pledged and appropriated all the moneys in any manner arising from the lands donated by the United States to this State for the construction of said section of the canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will yield the sum borrowed. and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal or any part thereof as finished; the sufficiency of which, for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee."

By a series of acts subsequently passed authorizing the issue of other bonds the canal lands, &c., were also pledged for their redemption.

The first of said acts was passed February 1, 1834, and autthorized by its first section the loan to the State of $400,000, for which bonds were to be issued at a rate of interest not exceeding six per cent., redeemable by the State in forty years. And the second section of the act pledged the faith of the State, the canal, lands, &c., for the redemption of the bonds to be issued.

In 1835, February 6, another act was passed for the borrowing of $227,000 at 5 per cent. interest, and pledged the faith of the State, the canal, lands, &c., for the final redemption of the loan. (Sections 2 and 3, page 25, Acts of 1835.)

Then we had the Internal Improvement acts of 1836, (see Rev. St. 1838, page 337,) by the 10th section of which act $500,000 in addition were authorized to be loaned, and the 11th section of the act pledged the canal and lands which lies eastwardly of the Tippecanoe River for the redemption of the bonds, and provided "that separate accounts should be kept of the tolls, proceeds of the lands, &c., and the same strictly applied to the payment of the canal fund, for which, by various acts of the General Assembly, they have been specifically pledged."

All these bonds commencing in 1832, (of which the complainant's is one of the series,) and ending in 1836, and known as "*the Wabash and Erie Canal bonds*," were protected in their respective rights and priorities by the acts of 1846–'7, before referred to, incorporating the defendants.

The first sections of those respective acts provide for the surrender of the bonds and the issuing of new certificates of like dignity, one moiety to be paid by the State out of its revenues to be raised by taxation, and the other moiety to be charged exclusively upon the canal.

The last proviso of the 8th section of the supplemental act declares that the State will not make any provision for payment of principal or interest on any internal improvement bond until surrendered under the acts, and new certificates issued.

This provision, when taken in connection with the other sections the acts, shows that the State absolutely intended, so far as it had the power to do, to arrange with, and pay all her bonded creditors in the mode pointed out in the acts creating the corporation defendant, and in no other way. The preamble of the act but too plainly shows that, as well as the concurrent history of that day; for it must be remembered that the State had not paid any interest upon her public debt for the then last six years, which interest was provided for in the general arrangement.

But it is said that the exception in the last clause of section 8 of the original act, which imposes a condition in the deed of the State to be executed by the Governor to the Trustees, viz: "*subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of, or in relation thereto,*" so limits and controls the trust that the Trustees hold all the lands, canal, &c., east of Tippecanoe river, for the use of the holders of the unsurrendered Wabash and Erie canal bonds, and that it was their "rights and equities" that was reserved in the acts and deed. In fact the whole case of the complainant rests upon this assumption. Now, if in point of fact the Legislature specially preserved all the rights of the holders of this class of bonds, and made them better off in the surrender of their bonds than they were before, as the case in 4th Indiana, *supra*, conclusively shows, then the construction contended for by complainant cannot prevail, and the condition is to be referred to other subjects, of which there can be no doubt at all it was intended to apply.

The State had sold the canal lands upon credit, had provided for pre-emptions, and had leased the water power created by the canal, and was also liable for damages for material, right of way, and labor had, and taken, and employed in the construction of the canal. There was near a half million of dollars of scrip issued by the State, and redeemable in the lands conveyed. This scrip had been issued for labor in constructing the canal, and was of two classes, expressly charged upon the lands granted by the United States to the State to construct the canal. A part was charged upon the lands east of Tippecanoe river, and a part of it upon the lands west to Terre Haute. It was estimated at the time by the Auditor of State to be $

The Trustees were expressly prohibited "from buying or selling the scrip, or from receiving it in payment of any land, or on any account, at any sum less than the face of such scrip and interest thereon," (sec. 12 supplemental act,) and see section 25 original act providing for the payment of lands before sold.

It is the rule of decision in Indiana that the Trustees in all things, when not otherwise directed in the acts of their creation, are to be

governed in the execution of their trust by the laws as they existed, and controlled the respective officers of the State, having charge of the canal before the creation of the trust. This was decided in Johnson's case, 2d Ind.. (Carter) 219.

Hence it is to be conclusively inferred that the exception or condition in the 8th section to be inserted in the deed did not refer to the Wabash and Erie canal bonds, for they had been expressly provided for, but did refer to the scrip, water rents and leases, lands sold and unpaid for, right of way, and similar rights and equities, none of which were specifically enumerated, but all of great importance to the respective parties.

By the 32d section of the original act, *one half* the outstanding bonds were to be subscribed and surrendered before the act could take effect. The acts before cited, authorizing the creation of the bonds, pledged the public property for their redemption, and the complainant occupies the absurd position that if half the bonds had been withheld by the holders, unsurrendered, those holders could have came forward the moment the deed was made, and claimed the property in the hands of the Trustees as a pledge to them, and made so by the very acts creating the trust. Suppose all the subscribers had conducted as has the complainant? What inextricable confusion and discord would have ensued! Is it not fair to presume that these acts, (the last evidently prepared with great care,) if the complainant's views were intended to be carried out, would have provided in the scale of distribution, *first* for the payment of the principal and accruing interest to holders of the Wabash and Erie canal bonds, unsurrendered, and not left it to be *spelled* out of the exception in the 8th section, as the complainant now seeks to do; and if such provision had been thus plainly inserted, it is not to be supposed that any holder of such bonds would have subscribed at all.

The Legislature never intended any such result. They intended, and did carefully preserve to all the subscribing bond holders their priorities and specific liens upon the property to be conveyed to the Trustees, the same as it existed before. They in fact increased the lien of the holder of bonds of the class of the complainant's by extending the line of the canal, from which income was to be derived for their benefit, west from the mouth of Tippecanoe river to Lafayette, several miles being thus added. How could the holders of these surrendered bonds have this advantage, and of what avail is the separate accounts required to be kept by the Trustees for their benefit, if the holders of unsurrendered bonds are to be first paid?

These acts were passed with the avowed object, as expressed in the preamble, to provide for the payment of the public debt, in part by taxation, and in part by a surrender of the canal to the bondholders; and so the acts contemplate the settlement of the whole debt in that way, and not by the assignment of the canal assetts as an insolvent for the benefit of creditors, but in the way of a mutual agreement with all creditors who should become parties thereto; for those, provision was made for the half of their debt by taxation; for

those who did not, no such provision was made, and notice was given in the act that none would be made; so that they, for their unsurrendered bonds have no part nor lot in the trusts.

The complainant, having joined in putting the trust in operation by surrendering and subscribing ten per cent. upon his thirteen 5 per cent. bonds, is now estopped from alleging that the acts of incorporation are invalid. He has become a party to the contract by his voluntary act, and he must stand by and abide by the charter as it is written. Van Hook *vs.* Whitlock, 26 Wend. 43.—Lee *vs.* Tillottson, 24 Wend. 337.—Robinson *vs.* Bank of Darien, 18 Geo. R. 90; 3 Comstock 511; 5 Hill (N. Y.) 472.

If the act of 1832 gave the complainant a lien upon the Canal, lands, &c., and if he might have enforced that lien, the property being in the hands of the defendants, nevertheless he cannot enforce the lien unless the acts incorporating the defendants prefer him, because within these decisions by adopting these acts, he has waived all rights except such as the acts give him.

But if it be still insisted that notwithstanding special provision was made for the Wabash and Erie Canal bonds, yet they were within the condition. I nsk what are the rights of Mr. Beers? Will any one pretend that his rights are superior or equal to the rights and equities of holders of similar bonds, who have come forward and paid their proportion of $815,000 in cash to extend and complete the Canal, and thus make the security more valuable, and for which they have had the Canal given into the hands of their Trustees and now hold it for their bonds and advance?

In the surrender of their bonds and the acceptance of stock certificates, they waived no right, they obtained no higher security, in short, neither party supposed or contemplated the release of any property pledged; the new certificates contain the pledge in terms, and as this form of certificate was embraced in the act to which Mr. Beers subscribed and put in force, he shall not now say that the holders of those certificates shall not enjoy all that the certificales pledge.

The complainant, with the other bondholders, subscribed and paid $815,000 to the fund to complete the Canal, and are likely, as shown by the answer, to lose $115,000 of this advance. It is alleged in the answer, and agreed to be true by the parties, that there are no assets to pay back this advance, unless the incomes of the Canal shall be sufficient to repay it; yet Mr. Beers, himself a subscriber, demands that the remnant of assets, in the hands of his own Trustees for a specific purpose, shall be devoted to the payment of the interest on his unsurrendered bonds, to the exclusion of the subscribers' advance, and all others having equal equities with him, before surrendering their bonds. If he can succeed, he will be in the better position of any subscribing bondholder, for he demands that this trust shall be executed by first paying the interest upon the unsurrendered bonds, thus deferring those who he must admit had equal equities with himself before they surrendered their bonds.

The complainant has no legal right to his demands, and can only obtain relief in equity; and it is not to be supposed that a Court of Equity will entertain a bill for the purpose of giving the complainant his full pay of his unsurrendered bonds, to the exclusion of the holders of $2,000,000, of a like character; which have been in good faith surrendered and ten per cent. paid thereon, a considerable portion of which advance they are likely to lose, even if the trust is extended, as the defendants contend. *Which of these parties have the best equity?*

Mr. Beers, as will be seen from the exhibit, is among the first to subscribe, and thus, as far as his influence would go, put the acts in force by alluring others to sign; and now that it is likely, from unforeseen causes, to turn out disastrously, he turns upon his associates and seeks to thwart this trust to his own purposes. Against this unnatural effort, the Trustees are bound, to the utmost, to resist. If Mr. Beers can succeed in forcing his construction upon the acts creating the trust, and obtaining a decree of this Court that the Trustees were bound to pay the interest on all unsurrendered Wabash and Erie Canal bonds, the Trustees will be in great danger of being successfully charged with maladministration of their trust, as it appears from their answer that they had assets of lands and proceeds of lands east of Tippecanoe River amounting to $318,097 80; that they have now but $30,000, and that there are only $200,000 of that class of bonds unsurrendered. According to the complainant's idea of this trust, of which he is a voluntary party, it was the duty of his Trustees, out of those assets, to have first first paid principal and interest of those unsurrendered bonds.

Again: if he is right in his assumption, the holders of these unsurrendered bonds have as good rights as he has. There are $200,000 of theirs, and but $2,000 of his, and $30,000 only of broken assets with which to pay. He has a decree for all his—over objection; but we should not stop here, if he has any right at all to be heard with his bonds, he certainly has no better right than the holders of the $2,000,000 of surrendered bonds, and the decree should be reversed and proper directions given as to them—first paying the advance.

But the Trustees deny that he has any right at all to be heard with his two bonds. That a trust of this magnitude is not to be set upon, frustrated, and broken up for so inconsiderable a consideration, and that there is no equity in favor of the complainant, who was among the first to give his name, money, and influence to give the acts effect.

It is therefore respectfully asked that the decree be reversed with direction to the Circuit Court of this district to dismiss the bill.

J. P. USHER,
Solicitor for Appellee.